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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 110

THOMAS A. GUSIK, A MINOR, BY HIS FATHER AND NEXT FRIEND, JOHN GUSIK, PETITIONER,

vs.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1950.

CERTIORARI GRANTED JUNE 5, 1950.

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DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO

DOCKET NO. 2160

THOMAS A. GUSIK, a minor by his father and next friend, JOHN GUSIK, 6136 Morton Avenue, Cleveland, Ohio,

Plaintiff,

v.

L. C. SCHILDER, Warden Federal Reformatory, Chillicothe, Ohio,

Defendant.

PETITION FOR WRIT OF HABEAS CORPUS
(Filed Apr. 27, 1948)

To the Honorable Judge of the District Court of the United States for the Southern District of Ohio:

The Petition of John Gusik, respectfully shows:

I

That your Petitioner is a citizen of the United States of America, residing in Cleveland, Ohio, and that he is the natural father of Thomas A. Gusik, a minor, nineteen years of age, and is entitled to the custody of said minor.

II

That your Petitioner's minor son, Thomas A. Gusik, is now being held in Federal Prison at Chillicothe, Ohio, and is being deprived of his liberty, by said L. C. SCHILDER, Warden of the Federal Reformatory at Chillicothe, Ohio, under color of authority of a Court Martial Judgment for the murder of two Italians at Tirrenia, Italy, on or about August 13, 1947, under a purported Court Martial Order, a copy of which is hereto attached,

marked "Exhibit A" and made a part hereof, the same as if fully rewritten herein.

III

That your Petitioner alleges that his said minor son, Thomas A. Gusik, has been denied due process of law and was convicted by said Court Martial at Tirrenia, Italy, on or about October —, 1947, and a copy of the trial record of the Court proceedings is hereto attached, marked "Exhibit B" and made a part hereof, the same as if fully rewritten herein; that by reason of the denial of the Constitutional rights guaranteed to said minor, Thomas A. Gusik, by the Fifth Amendment to the Constitution of the United States, said Court Martial Order and sentence are utterly void and of no effect; that they should be so declared by this Court and held for naught; and that the Petitioner's said minor son, Thomas A. Gusik, should be discharged from custody for the reasons hereinafter recited and set forth.

IV

That the Petitioner's said minor son, Thomas A. Gusik, was tried upon the following charges and specifications, in violation of the 92nd Article of War:

CHARGE: Violation of the 92nd Article of War.

SPECIFICATION 1: In that, Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

SPECIFICATION 2: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethough, willfully, deliberately, feloniously, unlawfully, and with pre-

meditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

Your Petitioner alleges that neither of the two charges were proved. No evidence was ever received by the Trial Court Martial as to **who shot whom.** The defendant, Thomas A. Gusik, was on trial for murder which involved a death penalty if he was found guilty. The Trial Record shows without contradiction that two sentries shot fifteen rounds apiece, and two Italian guards were shooting simultaneously in the same direction. At least four persons were shooting simultaneously at the same target. A medical doctor was present at the trial who extracted the bullets from the bodies of the two dead Italians, and stated that he had the bullets which he found in the bodies, but no effort was made by the prosecution to show from whose gun the bullets were discharged. The Record is absolutely without any proof that any bullet from the gun of the prisoner, Thomas A. Gusik, killed either of the Italians.

V

That the Record shows without dispute that the defendant, Thomas A. Gusik, was in proper discharge of his duties as a sentry when he fired at the marauders in company with others. As such sentry, acting under the orders of his Commanding Officer to call "Halt" and then shoot if the order was not obeyed, the defendant, Thomas A. Gusik, was entitled to the fullest protection of the law and his basic rights guaranteed to him by the United States Constitution.

VI

Your Petitioner further says that the defendant, Thomas A. Gusik, was not provided a fair, thorough and competent pre trial investigation in accordance with AW 70 in that the investigator was not competent or familiar with the mandatory provisions of AW 70; that

witnesses on behalf of the defendant were not interviewed; and that no ballistics tests were made.

VII

That the defendant, Thomas A. Gusik, was denied counsel of his choosing and was thereafter represented by counsel not of his own choosing, as guaranteed by the Articles of War No. 17 and by the Fifth Amendment of the Federal Constitution. Defendant's counsel was unprepared and incompetent; that his preparation for the trial of the defendant, Thomas A. Gusik, on the charge of murder, did not exceed ten minutes, two days before the trial, in preparation for the trial of a defendant on the charge of murder; that such conduct was tantamount to a trial of the defendant without counsel, in violation of Article of War 17, Paragraphs 43, 45a, and 45b of Manual of Courts-Martial, and the Fifth Amendment of the Constitution of the United States.

VIII

Your Petitioner further alleges that defense counsel offered no evidence on behalf of his client, and made no defense whatever to the accusation of murder. Said defense counsel failed to show that the defendant, Thomas A. Gusik, was in discharge of his proper orders and was on duty as a sentry at the time the defendant fired at the marauders in company with another sentry, who fired an equal number of shots almost simultaneously, together with the shots that were fired by Italian guards on duty at the compound, in violation of AW 17, Paragraphs 43, 45a, and 45b, and 75c of Manual of Courts-Martial, and the Fifth Amendment of the Constitution of the United States.

IX

That the Petitioner charges that there was misconduct of the Court Martial Board in that the President of the Court asked a highly prejudicial question in the same

identical words to which an objection had previously been made by defendant's counsel, and to which the Law Member of the Court had previously sustained the objection.

X

That the Petitioner charges further that the Record in this case shows that there was misconduct on the part of the Trial Judge Advocate; in suppressing evidence favorable to the accused in direct violation of Paragraph 41d of Manual of Courts-Martial. The Trial Judge Advocate negligently and maliciously failed to reveal the whole truth to the Trial Court Martial. Your Petitioner contends that it was the duty of the Trial Judge Advocate in the Court Martial Procedure to see that the accused, Thomas A. Gusik, was dealt with fairly. In this particular instance, the testimony of the Italian guards who fired simultaneously with the defendant sentry was suppressed. The Trial Judge Advocate also suppressed the testimony that the marauders had fired shots into the depot which the defendant sentry was guarding.

XI

That your Petitioner alleges that the Trial Judge Advocate was also guilty of misconduct and violation of Paragraph 41d of Manual of Courts-Martial in the suppressing of two previously written statements made by the defendant, Thomas A. Gusik. The only written statement submitted to the Trial Court was the statement which the defendant, Thomas A. Gusik, did not make in its entirety, but was a statement written by someone else and forced upon the defendant, Thomas A. Gusik, by promises of leniency and reward and by threats if he did not sign that statement, in violation of AW 24, AW 70, and 35a of Manual of Courts-Martial, and the Fifth Amendment to the Federal Constitution.

XII

That your Petitioner further alleges that Article of War 37 and Paragraph 87 (b) of the Military Courts Martial Manual vested a sound legal discretion in the reviewing authority to the end that substantial justice may be done. The totality of errors appearing in the case record shows a denial of justice to the defendant, Thomas A. Gusik; the failure and refusal of the Reviewing Authority to order a new trial was an abuse of judicial discretion. Your Petitioner further alleges that the refusal of the Reviewing Authority to take cognizance of the pre trial investigation, as required by the Article of War No. 70, constitutes a further abuse of judicial discretion, in violation of the Fifth Amendment of the Constitution of the United States.

XIII

That your Petitioner alleges that the failure of the Courts Martial Board to apply the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the United States was highly prejudicial to the defendant, Thomas A. Gusik, and amounted to a denial of justice and a thorough absence of a fair and impartial trial procedure, in violation of Paragraph 111 of Manual of Courts-Martial and the Fifth Amendment of the Federal Constitution.

XIV

That your Petitioner further charges that the failure of the investigating officer to explain to the accused his right to decline to make a statement, and their repeated inquisitions without legal counsel, and under circumstances to inspire terror in an 18 year old boy, was a violation of the defendant's rights under the Fifth Amendment of the Constitution of the United States and Article of War No. 24.

WHEREFORE, your Petitioner prays for a writ of Habeas Corpus herein directing said L. C. SCHILDER, Warden of the Chillicothe Federal Reformatory, to bring the said minor, Thomas A. Gusik, to this Court, or before a Judge thereof, to be bailed; that this matter be set down for early hearing; and that upon said hearing, said Petitioner's minor son, Thomas A. Gusik, be discharged and be restored to all things which he has lost by reason of said Court Martial Trial; and that said L. C. SCHILDER, Warden of the Chillicothe Federal Reformatory, be restrained from attempting to transfer or from honoring any order to transfer said Thomas Gusik out of the jurisdiction of this Court.

Morris Morgenstern
John H. Price
Cedric M. Griffith
Leo Chimo
Francis E. Picklow
Edward J. Sklenicka
Hudson Hyatt
Bernard B. Direnfeld, Jr.
Anthony Lysowski
Joseph Horwitz
Attorneys for Petitioner,
John Gusik.

State of Ohio, Cuyahoga County, SS:

JOHN GUSIK, being first duly sworn, deposes and says that he is the father and next friend of Thomas A. Gusik, a minor, plaintiff in the within entitled action; that he has read the foregoing petition; and that the facts stated and allegations therein contained are true as he verily believes.

John Gusik.

SWORN TO BEFORE ME and subscribed in my presence at Cleveland, Ohio, this 24th day of April, 1948.

Morris Morgenstern
Notary Public
Commission expires 11-12-50.

WRIT OF HABEAS CORPUS

To: L. C. Schilder, Warden, Federal Reformatory, Chillicothe, Ohio.

You are hereby commanded to bring the body and person of THOMAS A. GUSIK, together with this writ, into this Court on the 28th day of June, 1948, at 10 o'clock, A.M., then and there to do, submit to and receive whatsoever the said Judge may consider in that behalf; and have you then and there this writ.

Mell G. Underwood,
Judge, U. S. District Court
Southern District of Ohio
Eastern Division

U. S. Marshal's Return
S. D. Ohio

Received this writ at Columbus, O., on the 1st day of June 1948 and on the same day I mailed a true copy of this writ to L. C. Schilder, Warden, Fed. Reformatory at Chillicothe, Ohio.

H. K. Claypool
U. S. Marshal, S. D. O.
By: Anthony R. Albanese,
Deputy.

ATTEST:
Harry F. Rabe,
Clerk, U. S. District Court,
By: H. E. Parker,
Deputy.
Marshal's Fees, $2.00.

RETURN TO WRIT OF HABEAS CORPUS
(Filed Jun. 17, 1948)

Comes now the respondent named, upon whom was served a writ of habeas corpus for the production of the Petitioner's son, Thomas A. Gusik, and respectfully makes return to said writ and shows the Honorable Court as follows:

I. That said Petitioner's son, Thomas A. Gusik, was enlisted into the Army of the United States on 19 July 1946, at Cleveland, Ohio, to serve for a period of one year and a half. That on or about 13 August 1947, at or near Tirrenia, Italy, the said Thomas A. Gusik wilfully, feloniously and with premeditation killed Salavatore Montalbano and Teodoro Moro, human beings, by shooting them with a carbine. That on 9 October 1947 at Leghorn, Italy, the said Thomas A. Gusik was arraigned before a general court-martial appointed and convened by the Commanding Officer, Headquarters, Port of Leghorn, pursuant to Special Orders Number 50, dated 6 October 1947 of said headquarters. That after trial by said court-martial Thomas A. Gusik was found guilty of the charges and specifications and sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The Commanding Officer, Port of Leghorn, as the reviewing authority did review the record of Thomas A. Gusik's trial and did on 13 October 1947 approve said sentence and forwarded the said record of trial for action under Article of War 50½. Thereafter, said record of trial was examined by the Board of Review in the Office of the Judge Advocate General and said Board of Review submitted its opinion in writing to The Judge Advocate General wherein it held that the record of trial was legally sufficient to support the sentence. The opinion of the Board of Review was concurred in by The Judge Advocate General who recommended that the period of confinement be reduced to 16 years. On 26 January 1948, the sentence as reduced

was promulgated by General Court-Martial Orders Number 32, Department of the Army, which designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement.

II. Respondent is the regularly appointed and qualified Warden of the Federal Reformatory, Chillicothe, Ohio. Respondent holds physical custody of Thomas A. Gusik under and by virtue of the authority of the above described court-martial order.

III. In obedience, however, to the said writ of habeas Corpus, the respondent herein produces before the Honorable Court the body of said Thomas A. Gusik, but alleges that Thomas A. Gusik is legally confined and imprisoned and that respondent legally holds the physical custody of the body of Thomas A. Gusik under the authority of aforesaid general court-marital order. Respondent respectfully prays upon the coming in of this return that this Honorable Court quash said writ of habeas corpus. Answering the petition of petitioner praying for the issuance of said writ of habeas corpus, this respondent admits, denies, and alleges as follows, to-wit:

1. Denies that he has knowledge or information sufficient to form a belief as to the allegations contained in paragraph I of the petition.

2. As answer to paragraph II of the petition, respondent admits that Thomas A. Gusik is now being held by the respondent in confinement at the Federal Reformatory, Chillicothe, Ohio, pursuant to the authority contained in General Court-Martial Orders Number 32, Department of the Army, dated 26 January 1948, and except as specifically admitted denies each and every other allegation in said paragraph contained.

3. Denies each and every allegation contained in paragraph III of said petition.

4. Admits so much of paragraph IV of said petition as alleges that said Thomas A. Gusik was tried upon charges and specifications in violation of the 92nd Article of War which alleges that Thomas A. Gusik did at or

near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Salvatore Montalbano and one Teodoro Moro, human beings, by shooting them with a carbine, and except as herein specifically admitted, denies each and every other allegation in said paragraph contained and affirmatively alleges that the matters set forth in said paragraph are wholly irrelevant and immaterial to the issues in this cause in that this Honorable Court in habeas corpus is not concerned with the sufficiency of the evidence to convict the said Thomas A. Gusik of the offenses of which he was found guilty by the general court-martial and in that the guilt or innocence of said Thomas A. Gusik is not an issue in this proceeding.

5. Answering paragraph V of the petition, respondent denies the allegations therein contained and alleges that the allegations set forth in said paragraph are wholly irrelevant and immaterial to the issues in this cause in that this Honorable Court may not consider the guilt or innocence of Thomas A. Gusik in these proceedings, such questions not being jurisdictional and not affecting in any respect the power, authority or jurisdiction of said general court-martial to subject Thomas A. Gusik to trial and make the findings of guilty or impose the sentence upon him.

6. Denies each and every allegation contained in paragraph VI of the petition and affirmatively alleges that the matters set forth in said paragraph, if true, are wholly irrelevant and immaterial to the issues in this cause in that the pre-trial investigation under Article of War 70 is not jurisdictional and does not in any respect affect the power, authority or jurisdiction of said general court-martial to subject said, Thomas A. Gusik, to trial and make the findings of guilty and impose the sentence upon him nor are any of the other allegations contained in said paragraph of a nature which this court may consider in habeas corpus proceedings. Respondent alleges that a thorough and impartial investiga-

tion pursuant to Article of War 70 was had in this case and that Article of War 70 was in all respects complied with.

7. Denies each and every allegation contained in paragraphs VII and VIII of the petition and affirmatively alleges that said Thomas A. Gusik was effectively represented at his trial by general court-martial by the regularly appointed defense counsel, a commissioned officer in the Army of the United States duly qualified to represent petitioner; that Thomas A. Gusik requested that he be represented by such regularly appointed defense counsel and such counsel diligently and vigorously defended Thomas A. Gusik throughout the said trial.

8. Denies the allegations set forth in paragraph IX of the petition and alleges that the matter set forth in said paragraph are not of a nature which this court may consider in habeas corpus proceedings.

9. Denies each and every allegation contained in paragraph X of the petition and affirmatively alleges that the trial judge advocate complied in all respects with the Articles of War and the Manual for Courts-Martial in the presentation of the prosecution's case against Thomas A. Gusik.

10. Denies the allegations contained in paragraphs XII and XIII of the petition and affirmatively alleges that the Reviewing Authority, the Board of Review and The Judge Advocate General complied in all respects with the Articles of War and the Manual for Courts-Martial in the appellate review of the record of trial of Thomas A. Gusik by general court-martial.

11. Denies each and every allegation contained in paragraph XIV of the petition and alleges that the investigating officer in the course of his investigation conducted in pursuance with the 70th Article of War duly informed said Thomas A. Gusik of his right to make a statement or of his right to remain silent and the investigating officer duly informed Thomas A. Gusik that any statement he might make might be used against him. Respondent alleges that Thomas A. Gusik did not make

any inculpatory statement to the investigating officer and further alleges that Thomas A. Gusik was not entitled to be represented by counsel at such investigation.

IV. Further answering the petition, respondent moves this court for an order dismissing the same on the following grounds:

(a) That said petition fails to show any cause for the release of Thomas A. Gusik from custody.

(b) That Thomas A. Gusik is in the custody of respondent pursuant to sentence imposed by general court-martial appointed and convened by the Commanding Officer, Port of Leghorn, Italy, and that said general court-martial which tried Thomas A. Gusik and which imposed sentence upon him had jurisdiction of his person and of the offenses for which he was tried and convicted, and the sentence imposed upon him is legal and valid under the statutes of Congress and the regulations made pursuant thereto; that irregularities and imperfections, if any, occurring before trial did not affect the jurisdiction of said general court-martial and should not be considered by the Honorable Court in these proceedings; that any errors affecting the rights of said Thomas A. Gusik which may have occurred during the trial before said court-martial are not questions or issues for review by this Honorable Court in these proceedings, but were for the consideration of the reviewing authority, the Board of Review and The Judge Advocate General pursuant to Article of War 50½.

Wherefore, having fully answered the petition and having shown the Honorable Court the authority by virtue of which respondent holds the custody of said Thomas A. Gusik, and having produced the body of said Thomas A. Gusik, respondent prays that the said writ of habeas corpus be quashed, that the petition be dismissed and the said Thomas A. Gusik be remanded into the custody of respondent to be held in confinement

and restraint pursuant to the mandates and requirements of the aforesaid general court-martial orders.

L. C. Schilder,
Respondent
Loren G. Windom,
Assistant United States
Attorney

TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS

Now comes the Petitioner herein and in Traverse to Respondent's Writ to the Writ of Habeas Corpus respectfully replies as follows:

1. Your Petitioner admits that his son, Thomas Gusik, enlisted in the Army of the United States on 19 July 1947, at Cleveland, Ohio, to serve for a period of a year and a half; denies that on or about 13 August 1947 in or near Tirrenia, Italy, the Said Thomas A. Gusik wilfully, feloniously and with premeditation killed Salvatore Montalbano and Teodoro Moro, human beings, by shooting them with a carbine;

Petitioner further states that his son had been denied due process of law and was tried and convicted by a general court-martial under the color or authority of said Board; that the General Court-Martial Board which tried said Gusik was without authority because of the failure of the United States Army to provide him with the safeguards guaranteed by the Articles of War and the Fifth Amendment of the Constitution, as set out hereinafter.

Your Petitioner states that said Thomas A. Gusik appeared before a purported General Court-Martial Board at Leghorn, Italy, on or about October 9, 1947, but denies that the said General Court-Martial Board was properly appointed and convened.

The Petitioner further denies that such court-martial appointment was pursuant to Special Orders Number 50 dated 6 October 1947.

Your Petitioner admits that the said Court-Martial Board did find Thomas A. Gusik guilty of the charges and specifications and did sentence Gusik to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life.

Your Petitioner alleges that the finding and sentence of said Court-Martial Board was void ab initio and of no effect for the reasons hereinafter set forth.

Your Petitioner is without knowledge or information as to whether the Commanding Officer, Port of Leghorn, as the reviewing authority, did review the record of said trial and approved said sentence pursuant to Article of War 50½ and therefore denies Respondent's allegation pertaining thereto.

Your Petitioner further states, affirmatively, that if it is proved that the Commanding Officer of the Port of Leghorn did review the record of said trial that it was guilty of abuse of legal discretion for the reasons set forth hereinafter.

Your Petitioner admits that the record of trial was examined by the Board of Review in the office of the Judge Advocate General and admits that said Board of Review did submit its opinion in writing to the Judge Advocate General; that the Judge Advocate General held the record of trial legally sufficient.

Pleading further, affirmatively, your Petitioner states that the Review Board's action was void and of no effect in that the Review Board was guilty of abuse of legal discretion as hereinafter set forth in detail.

Your Petitioner admits that the opinion of the Board of Review was concurred in by the Judge Advocate General but denies the validity of such order because of abuse or legal discretion as hereinafter set forth.

Your Petitioner admits that the sentence was subsequently reduced to sixteen years and that the Federal

Reformatory at Chillicothe, Ohio, was designated as the place of confinement.

Your Petitioner admits that the respondent, L. C. Schilder, is the legally appointed and qualified Warden of said reformatory but denies that said respondent holds physical custody of said Gusik under or by virtue of any lawful order, for the reasons hereinafter set forth.

Your Petitioner further denies that Thomas Gusik is legally confined in prison and/or that respondent legally holds physical custody of said Gusik in that the said general court-martial orders are void and of no effect for the reasons hereinafter set forth.

Petitioner respectfully prays that upon the coming in of this Traverse that this Honorable Court deny respondent's motion to quash said Writ of Habeas Corpus.

Replying to respondent's Answer to Petition hereinbefore submitted the Petitioner denies that any of the matters set forth in paragraph 4 of said Petition are irrelevant and immaterial, and alleges that each goes to the cause of action set forth in your Petitioner's pleadings.

Replying further to the respondent's Return to the Writ of Habeas Corpus your Petitioner states and sets forth herein as though fully rewritten herein all of the allegations, averments and facts as set forth in his original Petition to this Honorable Court.

Your Petitioner pleading further, herein denies each and evry material allegation contained in respondent's Return not herein specifically admitted to be true.

Morris Morgenstern
John H. Price
E. J. Sklenicka
A. P. Lysowski,
Francis E. Picklow
Leo B. Chimo
Joseph Horwitz,
Attorneys for Petitioner
Chester I. Koch
Secy. Committee.

Traverse to Return to Writ of Habeas Corpus.

State of Ohio, Cuyahoga County, ss:

JOHN GUSIK, being first duly sworn, according to law, deposes and says that he is the father of THOMAS GUSIK in the foregoing Traverse; that he has read the foregoing and that the statements, facts and allegations contained therein are true and correct, as he verily believes.

John Gusik

SWORN to before me and subscribed in my presence this 28th day of June, 1948.

Bernard B. Direnfeld, Jr.
Notary Public

MEMORANDUM
(Filed March 31, 1949.)

Private Thomas A. Gusik was convicted of first degree murder by a General Court-Martial at Leghorn, Italy, October 9, 1947 and was sentenced to life imprisonment. On January 26, 1948 a General Court-Martial Order No. 32 was issued by order of the Secretary of the Army which reduced the sentence to sixteen years in accordance with the recommendation of the Judge Advocate General.

Petitioner is presently confined at the Federal Reformatory at Chillicothe, Ohio, within the jurisdiction of this Court, from which institution he is now seeking release by habeas corpus.

This cause was heard before the Court on June 28, 1948; the hearing was continued by agreement of the parties to September 9, 1948. Following that date the Army was given time to produce witnesses whose testimony would be relevant to the charges made by the petitioner. On January 7, 1949 respondent presented a witness who

served as Pre-Trial Investigating Officer prior to the Court-Martial. Petitioner has presented a great deal of evidence which collaterally attacks the record of the Court-Martial proceedings and considerable testimony concerning alleged coercion practiced by the Army personnel investigating the case and taking statements from the petitioner. Considering the fact that petitioner is now confined under a sixteen-year sentence, and the fact that many of the charges which collaterally attack the record and which allege coercion, were not brought up in appeals from the original Court-Martial, this Court is inclined to weigh with extreme caution all such uncorroborated testimony of the petitioner.

The findings in this case are based primarily upon facts disclosed by official records of the investigation of the offense alleged, by official records of the Court-Martial, and by facts stated by witnesses called on behalf of the respondent.

The Court having carefully considered the evidence and the briefs filed on behalf of the petitioner and the respondent, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1—Petitioner was born May 30, 1929. He enlisted in the United States Army on July 19, 1946. On the night of August 12-13, 1947 when petitioner was just past eighteen years of age, he was acting as guard or sentry on Post No. 4 of Engineer Depot 2L76 near Tirrenia, Italy. Early in the morning of August 13, 1947 two Italian civilians were shot and killed near the wire fence enclosing the depot along petitioner's guard post.

2—The incident was subsequently referred to the Criminal Investigation Division of the United States Army for investigation. On September 16, 1947 a report was made of the incident by Robert M. Urdinarrain, a Criminal Investigation Division Agent, which report in-

cluded statements of thirteen persons who were in position to have some knowledge of the incident.

3—On the eighteenth of September 1947 the petitioner was charged in two specifications with violations of the 92nd Article of War. On the same day these charges were referred for pre-trial investigation to First Lieutenant William A. Calfee, who was designated as Investigating Officer.

4—Lieutenant Calfee read the entire report of the Criminal Investigation Division when he started his investigation.

5—The report of the Criminal Investigation Division contained a statement by a Private Parker which indicated that Private Parker was deeply involved in larcenies at Depot 2L76. In paragraph 3 at the first page of the Pre-Trial Investigating Officer's Report, Lieutenant Calfee states that he made known to the accused the substance of expected testimony of Private Parker.

6—In his Pre-trial Investigating Officer's Report, under the heading "Summary of Evidence and Expected Testimony", Lieutenant Calfee failed to include any summary of Private Parker's testimony. The testimony of Private Parker was received at the trial and it was most important and material testimony.

7—The report of the Criminal Investigation Division contained statements by three Italian Military Policemen and a statement of a Private First Class Frank Zahurones, all of whom were on guard duty near petitioner's guard post at the time of the shooting. The statements of the Italian Military Police indicate that at least two of them fired shots in the general direction of the spot where the victims were later found. The statement of one of the Italian Military Policemen indicates that shots were fired from the woods outside the Depot. The statement of Private First Class Zahurones indicates that he fired thirty rounds in the general direction of the spot where the victims were later found.

Findings of Fact.

8—The statements made by the Italian guards corroborated part of the petitioner's statement which was admitted in evidence at the Court-Martial.

9—In Paragraph 5 of Page One of the Pre-trial Investigating Officer's Report, Lieutenant Calfee states that he made known to the accused the substance of the expected testimony of the Italian Guards and of Private First Class Frank Zahournes. The Court finds that Lieutenant Calfee knew or should have known all of the details contained in the statement given to the Criminal Investigation Division by the Italian Military Policemen and by Private Parker and Private First Class Zahurones.

10—In his Pre-trial Investigating Officer's Report, under the heading of "Summary of Evidence and Expected Testimony", Lieutenant Calfee failed to mention the shots by the Italian Military Policemen and by Private First Class Zahurones in the general direction of the spot where the bodies of the two victims were found. The "Summary of Evidence and Expected Testimony" also fails to mention the statement by one Italian Military Policeman concerning shots fired from the woods outside the Depot.

11—The Italian Military Policemen were using carbines of a type different from those used by the American soldiers.

12—There is no indication in the Pre-trial Investigating Officer's Report that ballistic tests of the bullets found in the two Italian victims were made, attempted, or even considered.

13—On Page 2 of the Pre-trial Investigating Officer's Report, under paragraph 6, entitled "Explanatory and Extenuating Circumstances" in written "None." The Court finds that the report of the Criminal Investigation Division, which the Investigating Officer had available at the start of his investigation, revealed many circumstances which were explanatory and extenuating.

Findings of Fact.

14—Article of War 70 provides in part as follows:

> "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made."

15—The petitioner was tried by a General Court-Martial on October 9, 1947. Considering the Pre-trial-Investigating Officer's Report in connection with information which it was admitted was available to the Investigating Officer, the Court finds that the pre-trial investigation was neither thorough nor impartial.

16—Article of War 38 provides:

> "The president may by regulations which he may modify from time to time prescribe the procedure, including the modes of proof, in cases before Courts-Martial *****"

On November 29, 1927 President Coolidge prescribed procedures for Court-Martial in a Manual for Courts-Martial, which became effective on and after April 1, 1928 and which, with corrections subsequently made, was controlling of procedure for the Court-Martial of the petioner.

17—The Official Manual for Courts-Martial, United States Army, in effect at the time of petitioner's Court-Martial, provides that the Trial Judge Advocate shall receive a charge sheet. This Manual also provides that defense counsel shall be informed that a copy of the charge sheet has been served on the accused.

18—The official charge sheet in this case lists three Italian Military Policemen as witnesses against the accused.

19—The Court finds that both the Trial Judge Advocate and the defense counsel knew or should have known that the three Italian Military Policemen were material witnesses in the case.

Findings of Fact.

20—The Court finds that the Manual of Courts-Martial, United States Army, provides that any act of the Trial Judge Advocate inconsistent with a genuine desire to have the whole truth revealed is prohibited.

21—The Court finds that the failure of the Trial Judge Advocate to call witnesses who were listed on the charge sheet, when he knew or should have known that their testimony was material, was an act inconsistent with a genuine desire to have the whole truth revealed.

22—The report of the Pre-trial Investigating Officer states the the substance of the expected testimony of Private Parker, Private Zahurones and the three Italian Military Policemen was made known to the accused.

23—The Manual for Courts-Martial, United State Army, provides that ample opportunity will be given the defense counsel and the accused properly to prepare the defense, including the opportunities to interview each other and any other person.

24—The Manual for Courts-Martial, United States Army, provides that the defense counsel will perform such duties as usually devolve upon counsel for defendants before civil courts in a criminal case, and also provides that defense counsel will guard the interests of the accused by all honorable and legitimate means known to the law.

25—The Court finds that the defense counsel failed to perform his task to defend the accused in accordance with the rules of the Manual for Courts-Martial, United States Army, either by failing to ascertain the testimony of the Italian guards, or by failing to introduce it at the Court-Martial.

26—The Court finds that petitioner was denied the effective assistance of counsel.

CONCLUSIONS OF LAW

1—This Court has jurisdiction of the parties and the subject matter of this action.

Conclusions of Law.

2—The Court-Martial Court did not have jurisdiction to try the petitioner because no thorough and impartial pre-trial investigation was conducted in compliance with Article of War 70.

3—The Court-Martial Court did not have jurisdiction to sentence the petitioner because the Trial Judge Advocate failed to call all material witnesses, which was an act inconsistent with a genuine desire to have the whole truth revealed and, therefore, prohibited by the Manual, for Courts-Martial, United States Army.

4—The Court-Martial Court did not have the jurisdiction to sentence the petitioner because he was denied the effective assistance of counsel.

5—Petitioner has been deprived of his liberty without due process of law and should, therefore, be released from the custody of the respondent.

Order accordingly.

Mell G. Underwood,
Judge, U. S. District Court.

ORDER OF COURT

(Filed March 31, 1949.)

This cause came on to be heard on the petition and the testimony, and the Court being fully advised of the premises finds that the Plaintiff, John Gusik, Petitioner, is entitled to the custody of the said Thomas A. Gusik, a minor, and that the said Thomas A. Gusik is unlawfully detained by the said L. C. Schilder, Warden, Federal Reformatory, Chillicothe, Ohio.

It is, therefore, ordered, adjudged and decreed that the said John Gusik, Petitioner, and father of the said Thomas A. Gusik, a minor, has the custody of the said Thomas A. Gusik as prayed for in his petition.

Order for Release.

The Court further finds that the petitioner, Thomas A. Gusik, a minor, by his father and next friend, John Gusik, has been deprived of his liberty without due process of law and should, therefore, be released from the custody of the respondent. It is further ordered by this Court that the petitioner be released immediately from the custody of the respondent, and that bond in the amount of $2,000.00 Dollars is set.

Mell G. Underwood,
Judge, U. S. District Court.

Approved;
Morris Morgenstern,
One of the attorneys for Petitioner

Loren G. Windom,
One of the attorneys for Respondent
Ass't. U. S. Attorney.

PROCEEDINGS

(Filed May 26, 1949.)

MORNING SESSION,

June 28, 1948.

(The opening statement on behalf of the Petitioner was made by Mr. Price, after which the following further proceedings were had):

MR. WINDOM: Your Honor please, on behalf of the Warden, Mr. Schilder, I move to dismiss the writ at this time. Accepting the statements of counsel, he has made no allegations whatsoever to vest in your Honor jurisdiction to proceed further for hearing a writ of habeas corpus.

(Discussion between Court and counsel.)

THE COURT: The Court will reserve ruling on your motion to dismiss and proceed to hear the case.

(Discussion between Court and counsel.)

(And thereupon a recess was had until 2:00 o'clock, P. M., of same day.)

AFTERNOON SESSION,

June 28, 1948.

MR. MORGENSTERN: May it please your Honor, at this time I should like to have a stipulation that Mr. John Gusik, the father of Thomas Gusik and next friend, is a citizen of the United States and is his father. We can save a lot of time if that is stipulated by counsel.

MR. WINDOM: That is agreeable.

THE COURT: Did the Court understand that the District Attorney had offered the record in this case in evidence?

MR. WINDOM: We will offer it, your Honor. I think it will be of assistance.

THE COURT: Without objection it will be admitted.

MR. MORGENSTERN: We are objecting to the introduction of the record and taking our exceptions.

And thereupon the record was offered and admitted in evidence and is herewith submitted marked Respondent's Exhibit A, and made a part hereof.

BE IT REMEMBERED, That the petitioner, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to-wit:

Thomas A. Gusik,

offered himself as a witness in his own behalf and testified as follows:

Examined by Mr. Morgenstern:

Q What is your name?
A Thomas A. Gusik.
Q Where were you born?
A At Cleveland, Ohio.
Q When?
A May 30, 1929.
Q Where did you attend school?
A Our Lady of Lourdes and Nathan Hale.
Q And Nathan Hale?
A Nathan Hale Junior High.
Q Where is that located?
A On East Boulevard.
Q What city?
A Cleveland.
Q Did you attend church?
A Yes.
Q What were your activities during the time you were in school?

MR. WINDOM: Object. The Government sees no materiality.

THE COURT: What does that have to do with this case?

MR. MORGENSTERN: Excepting, Your Honor, we want to show the type of boy he was before he went into the Army and then I will bring it up to the Army.

THE COURT: It will be admitted. Objection overruled.

A Well, I played athletics.
Q Talk a little louder.
A I played athletics, was in Boy Scouts, sold bonds during the War while I was in the Boy Scouts.
Q You enlisted in the Army of the United States; is that correct?
A That's correct.

Q How old were you at the time you enlisted?
A Seventeen.
Q Do you recall the date of enlistment?
A July 19, 1946.
Q And where did you enlist from?
A From Cleveland, Ohio.
Q After you enlisted where did you go? What was your itinerary in Service?
A Fort Bliss, Texas.
Q How long were you there?
A Eight weeks.
Q From there where were you sent?
A I was transferred to the 82nd Airborne Division at Fort Bragg, North Carolina.
Q How long were you there?
A About two months.
Q Were you shipped overseas?
A Yes, sir.
Q When did that take place?
A I left New York December 15, 1946 and I landed in Leghorn, Italy, December 26, 1946.
Q And when you arrived at Leghorn were you stationed there?
A No. I was sent up to the 88th Infantry Division up in Tirrenia.
Q In where?
A Tirrenia, Italy.
Q Were you finally stationed in Tirrenia?
A Yes. March 8, 1947, I was stationed there.
Q March 8, 1947?
A That is right.
Q You were stationed in Tirrenia, Italy; is that correct?
A That's correct.
Q What duties did you have in Tirrenia, Italy?
A Guard duty.
Q What was it?
A Guard duty.

Q Will you describe what your duty as guard consisted of?

A Well, we had a big engineer depot down there and we pulled guard one day on and one day off.

Q Were you given your instructions on guard duty?

A Yes, I was.

MR. WINDOM: We object, Your Honor. We are getting squarely now into the question that has to, of course, come out, that is, whether they may go outside of the record which is marked Respondent's Exhibit Number 1. What his instructions were show in the record. They are part of that case and they can neither be bolstered nor denied from this witness stand. The Government takes the position, based upon the authorities we have cited to you in our brief filed herein, that this is not admissible.

THE COURT: The Court will reserve a ruling and permit the witness to testify. If the testimony is found irrelevant, incompetent, it will be excluded; otherwise it will be considered.

MR. WINDOM: May our objection go as to the entire examination of this witness then, Your Honor?

THE COURT: No.

MR. WINDOM: Do we have to renew it each question?

THE COURT: No. He may examine him on other matters pertaining to the record. You can't take a general objection as to his testimony.

MR. WINDOM: I am just trying to save time.

THE COURT: The Court can advise you at this time that it intends to hear his side of this case.

MR. WINDOM: That is what I am asking. May I have a general objection to that testimony?

THE COURT: You may have an objection to the testimony which the witness gives which may be outside this record. I think it would be better for you to save your record, although I want you to understand the po-

sition of the Court. The Court intends to hear all the factual background which may have any bearing upon the question of whether or not this man has been deprived of his constitutional rights.

MR. WINDOM: Yes, Your Honor, I realize that. I just hate to interrupt Mr. Horgenstern at the end of every question. If he will go slow so that I may get my objection in, please.

THE COURT: I think you can consider, Colonel Windom, that if it is testimony extraneous to the record the Court will accord you an objection, because the Court is admitting it under a reserved ruling.

Q Now, what were your duties as a guard?

A Guarding an engineer depot.

Q Guarding what?

A An engineer depot.

Q An engineer depot. What did you have to do as a guard?

MR. WINDOM: We object.

THE COURT: The same ruling.

A Keep all unauthorized persons out of that depot.

Q And what else?

MR. WINDOM: Objection.

Q I will ask you whether or not part of your guard duty was to protect American property?

MR. WINDOM: Objection.

THE COURT: Yes, as to the form of the question. Let him tell what his duties were. The question is leading and suggestive. Objection Sustained.

MR. MORGENSTERN: I will withdraw that.

Q Now, during the time you acted as guard as an American soldier on guard duty in Tirrenia, Italy, did you ever have any occasion prior to the 12th or 13th of August of 1947 to make an arrest of any persons, unauthorized persons, who came into or attempted to come into the American compound in Tirrenia, Italy?

MR. WINDOM: Objection.

A Yes, sir.

THE COURT: What do you claim for this? Do you expect to show any connection?

MR. MORGENSTERN: Yes, Your Honor. I want to show that while he was on guard duty there were certain activities going on in which he had made arrests. And then following this I will indicate what took place; that he was an American soldier doing guard duty performing his duty.

THE COURT: Well, unless the arrests have some connection with it —

MR. MORGENSTERN: With the type of guard duty he was doing, Your Honor?

THE COURT: No. With the charge involved in this case. Upon your express promise that you will show a connection, the Court will permit the witness to answer.

Q Now, what was your assignment on August 12 of 1947?

MR. WINDOM: Objection.

A Guard duty in Area 5-B.

Q This Area 5-B was located where?

A In the eastern part of the depot.

Q Now, coming to the morning of the 13th day of August, what were the hours of your guard duty?

MR. WINDOM: Objection.

A From three to five in the morning and from nine to eleven in the afternoon.

Q And what were your special or general orders on the morning of August 13, 1947?

MR. WINDOM: Object.

A Allow no one to pass inside that area that I was guarding between the hours of five o'clock and eight o'clock that morning.

THE COURT: In order that counsel may understand the ruling of the Court, all of this testimony is going in under a reserved ruling as stated by the Court a few moments ago. If found relevant to the issue in

this case it will be considered, otherwise it wil be excluded.

MR. WINDOM: The Government would like to have an objection to every question of this witness?

THE COURT: Well, you may have an objection to all this line of testimony to which the witness just testified, that is, as to matters extraneous to this record.

MR. WINDOM: I am going to have to continue to object each time then, Your Honor.

THE COURT: Now, Colonel Windom, you have a perfect right to make your record. You are representing the Government of the United States. I think the Court has made his position clear.

MR. WINDOM: No, sir, you haven't.

THE COURT: Well, under a reserved ruling counsel should understand that the Court is permitting it to go in and will determine later whether or not it will be considered in this case.

MR. WINDOM: I thoroughly understand that, Your Honor. I asked you if I might have an objection to the entire questioning of this witness. Your Honor has said no.

THE COURT: Well, it is not the practice of this Court to permit a lawyer to take general objections to all of the testimony, because there may be certain testimony which is clearly admissable.

MR. WINDOM: I am not asking your ruling in advance. I understand what Your Honor is going to do, that you are taking it in subject to consideration.

THE COURT: Yes. The Court has no desire to keep you from protecting your record in any way you see fit and proper, and if you want to lodge a general objection to all this testimony you may do so in the record.

MR. WINDOM: That is what I am trying to do, Your Honor, to save each objection.

THE COURT: The Court intends to hear the entire story, no matter what your position is as to the limitations.

MR. O'DONNELL: Does the Court take the position now that you are going to permit this witness to testify as if he were on trial in the military proceedings?

THE COURT: Yes. But the Court is not prepared to say at this time as to whether or not any of it is admissible.

MR. O'DONNELL: Very well, Your Honor.

THE COURT: The Court intends to hear his story.

Q Now, prior to the 13th of August when you received your assignment at this American compound in Tirrenia, Italy, had you made any previous arrests of thieves who attempted to break in and steal American property?

A Yes, sir.

Q Do you recall on how many occasions while doing guard duty you arrested thieves who attempted to break in and steal American property?

MR. O'DONNELL: Now, the Government objects to that.

THE COURT: Yes.

MR. O'DONNELL: If the Court please, what is a thief and what is not a thief is a conclusion.

THE COURT: Yes. Sustained.

MR. MORGENSTERN: Well, I will withdraw that part and I will put it this way, Your Honor.

Q Did you arrest persons attempting to break into the American compound to steal American property?

MR. O'DONNELL: Object.

THE COURT: Yes, unless there is some connection with this case. He may have arrested hundreds or dozens that would have no connection whatever with this case. Sustained.

Q Referring again now to your assignment of guard duty on the 13th day of August in 1947 at Tirrenia, Italy: What time did you go on duty that morning?

A That morning I went on from three hundred to five hundred.

Q Meaning particularly what hours?

A Three to five.

Q Three to five. Now, prior to the time that you went on guard duty did you go to the guardhouse to get your assignment and orders?

A No.

Q You did not on that day. When did you get your orders?

A On the 12th.

Q At 12:00 o'clock. Now, do you recall what your general or special orders as a guard for that day were?

A Yes.

Q What were your general or special orders as a guard?

A Well, to walk on the inside of the fence and observing for holes or night lights being blown out around the fence, or if anybody attempts to break into the area fire a warning shot into the air and holler "Halt." If they fail to halt at that, shoot to kill.

Q Were you armed?

A Yes.

Q What type of arms did you have on you at the time you were on guard duty?

A An automatic carbine.

Q Automatic carbine?

A That's right.

Q Do you recall the number of the carbine assigned to you on that day?

A 000571.

Q Were there any other Americans who were doing guard duty with you at that particular compound at Tirrenia, Italy, on that morning?

A Yes.

Q And who was the other American guard?

A Private Zahurones.

Q He was doing guard duty where in comparison to where you were?

A He was right next to me. There was a gate over there.

Q Were there any others who were doing guard duty at this American compound on this morning?

A Yes.

Q Who were the others?

A There was five Italian guards.

Q And were these Italian guards armed?

A Yes.

Q And what type of arms did these Italian guards have?

A Italian rifles.

Q And what were their duties, if you know?

A Well, keeping anybody out that may have slipped in through the fence while we were on the other part of the fence checking. Why, their duties was to walk around the inside of the area looking between the equipment if anybody was in there.

Q Can you describe this depot area where you were doing guard duty?

A I would say it was about three or four hundred yards long and about 150 to 200 yards wide. It had equipment in there, such as semi's, sixty's—

Q When you say "semi's" you mean what?

A Semi trucks.

Q All right.

A Sixty's.

Q Sixty's are what?

A Two and a half ton truck, three quarter ton, weapon carriers, fire engines and bulldozers.

Q Was there any automobile accessory equipment there also at this depot?

A Yes.

Q Can you describe just about the extent of the equipment that was there at this depot area at Tirrentia?

A There was at least 500 vehicles in that area.

Q Do you know how many tires and what gasoline were there when you were doing guard duty there that night?

A No. There was a small hut over there that had a lot of tires stored up in it, reserve tires.

Q Where was the gasoline stored?

A There was some in the tanks of the trucks. Some of the trucks were still going.

Q Now, did something unusual happen at about 3:30 on the morning of the 13th day of August, 1947, while you were doing guard duty?

A Yes, sir.

Q Were you approached by an individual?

A Yes, sir.

Q What was the name of this individual?

A Franco.

Q What did he ask of you?

A He asked me to let him in; that a certain G. I. in another post told him to come into my area, that there was a lot of tires and gas.

Q What did you tell this Franco?

A I refused him. I told him to get out, to beat it.

Q And when you told him to get out and beat it and you refused him admittance, what did he say to you?

A He went back into the woods.

Q About that time did anything of an unusual nature happen?

A Yes.

Q Will you describe to his Honor just what happened?

A Well, after he walked back into the woods I started walking my post again and a shot was fired at me. I crawled underneath a stone crusher that was near the fence, and I waited there from three to five minutes and nothing happened, so I crawled back out. I walked, I would say, about 30 yards when I heard the fence being cut open. I halted them. They kept coming in. I halted them the second time, and I fired one shot into the air and they fired back. That's when the two Italian guards out there with me, and Private Zahurones that was guarding the gate—they came to my asssitance.

Q And when you say they came to your assistance, what do you mean by that expression?

A They started shooting at the shadows, too, out there, the silhouettes. It was pretty dark.

Q So that there was simultaneous shooting of yourself, Zahurones, and the two Italian guards in the general

direction from where the shot which was fired at you came?

A That's right.

Q Had you ever seen this person Franco before?

A Yes.

Q When?

A I seen him numerous times.

Q And under what circumstances?

A Well, being arrested for breaking into various parts of the depot.

Q Had you ever had any dealings with this Franco?

A No.

Q Now, after the simultaneous shooting of yourself and Zaharones, the other guards, and the two Italian guards in the direction of the fence, where they shot at you, what then did you hear, see or observe?

A Well, after all the shooting stopped we heard somebody moaning outside the fence. So then we signaled for the Corporal of the Guard to come out.

Q Yes.

A The Corporal of the Guard came out first, followed by the Sergeant of the Guard and the O. D. When the O. D. arrived over there he ordered me and the Corporal of the Guard to go out by the fence to bring the one that was living inside. When we got out there we discovered there was two. There was one dead and one living.

Q Did you still have your carbine with you?

A Yes.

Q —at the time? And did the other guard have his carbine with him?

A Yes.

Q Did the two Italian guards have their guns or rifles with them?

A Yes.

Q Was your carbine taken from you to be examined?

A No.

Q Were there any test shots fired from your carbine after this shooting incident?

A No.

Q Did you then continue on your guard duty?

A That's right.

Q Until what period of time that morning did you continue on your guard duty?

A Until five o'clock.

Q And then what happened after that?

A Well, the relief came out on the truck, and the O. D.—or, the Corporal of the Guard relieved me. So I passed the special orders on to this here guard.

Q What were the special orders which you passed on to the guard who relieved you?

A That some civilians had been shot in the area over there. The O. D. told me to pass on to him to keep his eyes open if there would be any more around there.

Q Now, immediately after the shooting you say the Corporal of the Guard came?

A Yes.

Q Or was sent for and came to you?

A Yes.

Q Did you then go to the area where these bodies lay?

A Yes.

Q And who went with you?

A The Corporal of the Guard.

Q And what did he tell you to do?

A Well, the O. D. ordered me and the Corporal of the Guard to go out there and bring the one that was—

Q By the O. D., you mean whom?

A The Officer of the Day, Lt. Birmingham.

Q Proceed.

A To go out there and bring the one that was wounded inside. When we went out there we found two of them.

Q Now, prior to the time that you found these wounded men were you given any instructions to see if there was anybody in the area?

A Yes.

Q What were your instructions and what did you do?

A Well, the O. D. — when he came out he told us to

look around underneath the trucks to see if there was anybody over there yet that may have stayed hidden over there. We looked around and then he ordered us to go out and get the guys. So we went out there and got them. We looked around in the woods for a while but found nothing else.

Q In looking around in the woods, before you looked there did he order you to do anything?

A Yes.

Q What did he order you to do?

A To bring the bodies in.

Q Now, you were then relieved by this guard after your guard mount was over at five in the morning. Where did you go then?

A I went to the guardhouse.

Q And then what happened?

A Why, I went into the guardhouse and checked in that I had been relieved.

Q What did you do with your carbine?

A I took it with me to my tent.

Q Was an examination made at that time of the carbnie, or was there a test bullet fired from your carbine?

A No.

Q And then when you went to the tent what happened after that?

A Why, I went to sleep.

Q All right, and then what followed that? What followed then the following day, or the same day?

A Well, we got woke up for chow, and after we got woke up for chow the O. D. said he would like to have a statement that they made a hole in the fence and came in. And I gave him that statement on the 13th. I gave it to him at one o'clock in the afternoon.

Q You made a statement at one o'clock in the afternoon of the 13th of August, 1947, referring to that shooting incident?

A That's right.

Q And you gave that to the Officer of the Day, did you?

A Yes.

Q And then what happened after that?

A Well, I was put under arrest for two days, under arrest of quarters until investigation.

Q What do you mean by "arrest of quarters"?

A I was restricted to any activities.

Q And you were kept in that area restricted in your activity for how long?

A For two days — until the 15th.

Q What was the purpose of that?

A To make an investigation.

Q Was there an investigation made, to your knowledge?

A Yes, there was.

Q Then what happened after the 15th of August?

A Well, they called me into the orderly room and told me that I was taken off.

Q Well, now, who called you to the orderly room and who told you what?

A The Battery Commander.

Q The Battery Commander called you to the orderly room?

A That is right.

Q Then what happened there and what did he tell you?

A He told me I was taken off of arrest of quarters because it had been proven justifiable homicide.

Q Then what happened?

A I was assigned back to guard duty.

Q You did guard duty at the same area at this depot; is that correct?

A Not the same area—different areas in the same depot.

Q Different areas in the same depot?

A That's right.

Q Were you given then the same arms that you had prior to the shooting incident?

A Yes.

Q And the carbine which you had was the same carbine?

A Yes.

Q How did you know that?

A We were each assigned a different carbine. I was assigned that one when I first got up in the 88th.

Q That was the same carbine that you had after the 15th day of August, 1947?

A That's right.

Q When you were told it was justifiable homicide and then you were restored back to duty?

A That's right.

Q And for how long a period of time did you remain on duty after you were told to go back to duty?

A Until the 31st of August, 1947.

Q So that you were on duty over a period of two weeks?

A That's right.

Q After the shooting incident?

A That's correct.

Q Duty as a guard, as an American soldier guarding American property?

A Yes.

Q What happened then on the 31st day of August, 1947?

A Well, about ten o'clock in the morning the Master Sergeant — talked to the Provost Marshal.

Q I didn't get that. You were a little too fast. Master Sergeant who?

A Master Sergeant Tuck.

Q What was his title?

A Provost Marshal.

Q Yes.

A Well, he had me called into the orderly room by the B. C.

Q Who is the B. C.?

A Lt. Ridler was the B. C. at that time.

Q Yes.

A And he called me in there, and he called Private Zahurones in there too. And he called Private Zahurones after he came into the orderly room — Sergeant Tuck called Private Zahurones over into his office and

I waited in the orderly room for about ten minutes. Then Zahurones went out and he called for me.

Q Who called for you?

A Tuck, Sergeant Tuck.

Q This Provost Sergeant Tuck?

A That's right.

Q All right, then that was ten minutes after he had been with Zahurones?

A That's right.

Q All right, now, when he came to you ten minutes after he had been with Zahurones just describe what happened?

A Well, he was armed and he came up to me and said that he wants to talk to me over in his office, I shouldn't try to run away on him.

Q Well, when you say he was armed, was he armed before that ten minutes' time?

A No, he wasn't.

Q I see. Now, after the 13th when you were assigned to regular guard duty did you have a conversation with a soldier by the name of Parker?

A Before or after the 13th?

Q Well, either on the 13th or immediately after the 13th?

A Yes.

Q This Parker was situated in the same area that you were?

A He was in the same tent I was.

Q Same tent. And what did Parker then say to you, if anything?

MR. O'DONNELL: Object.

THE COURT: Yes, what do you claim for this? It is purely hearsay, isn't it?

MR. MORGENSTERN: Sir?

THE COURT: Isn't it hearsay evidence?

MR. O'DONNELL: It sounds like it to me.

THE COURT: Sustained.

Q All right, now, we come back to the place where Provost Sergeant Tuck then was armed and was talking with you and told you then not to run away; is that right?

A That's right.

Q Where was this? Was it in a room? Were you seated?

A Yes, in his office.

Q Sir?

A In his office.

Q In Provost Sergeant Tuck's office?

A Yes, sir.

Q And he talked to you?

A That's right.

Q He had the gun and told you not to run away?

A That's right.

Q Then what transpired immediately he told you not to run away?

A He showed me the two pictures of the two Italians that were killed and then he told me that I murdered them, that I planned to murder them. He told me he was going to charge me with premeditated murder.

Q What did you tell him? What did you say to him?

A I said he was out of his head.

Q What else?

A I said I didn't kill anybody, I didn't murder nobody. So after that we went over to eat chow. He wanted a statement from me first. I told him I already gave them a statement. He said they lost it, but he don't know where it is. So I gave him another statement on the same order. Then after they took me down to the 503 H. P. jail in Leghorn on the 31st. I stayed there until the 2nd.

Q The 2nd of what?

A The 2nd of August, 1947.

Q You went there the 31st of August, didn't you?

A 31st of August.

Q The 2nd of what, then?

A September.

Q Sir?

A September.

Q Yes.

A They took me out on the 2nd and brought me back to camp and put me in the guardhouse until the 3rd of September.

Q What guardhouse was this?

A In the area, in the depot, 2076.

Q Yes.

A On the 3rd of September they took me to D. T. C.

Q What is the D. T. C.?

A Disciplinary Training Center.

Q Disciplinary Training Center located where?

A In Pisa, Italy.

Q Did you then give the second statement as he requested?

A Yes. On the 31st of August I gave it to him.

Q Was that second statement similar to the first statement that you had made?

A Yes.

Q Now, for how long were you at the D. T. C. at Pisa?

A On until the 14th of October.

Q Now, during the time that you were at the Disciplinary Training Center at Pisa, Italy, what, if anything, happened, and were you taken any place?

A Well, I was taken by the C. I. D. down town to their office numerous times.

Q Who is the C. I. D.?

A Criminal Investigation Department.

Q How many took you down and how many were there when you were at the office?

A Well, two of the guards from the D. T. C. Company — they took me down to the C. I. D., and they turned me over to the C. I. D. in the morning.

Q Now, how many times did that take place that they took you from the Disciplinary Training Center to the office of the Criminal Investigation Division?

A Five.

Q And what time in the morning did they get you?

A About six or six-thirty.

Q Now, when they took you from the Training Center to the C. I. D. office at six-thirty in the morning, what then happened at the C. I. D. office the first morning you got there?

A Well, they brought me in a small room over there and were asking me numerous questions.

Q Well, now, when they brought you in the small room who was there? How many people were there?

A There were four C. I. D. agents in there.

Q Then what did they do there?

A Well, they asked me to make a statement.

Q Before they asked you to make a statement, were you seated there or —?

A Yes.

Q All right, and then were they seated around you?

A No.

Q What was their position with reference to where you were at this place?

A Well, sometimes they were standing near me and then they were walking around me.

Q All right, and then what did they start doing?

A Well, they were asking me to make a statement for them.

Q Yes.

A To the effect what happened on the morning of the 13th of August.

Q Yes.

A I told them I had already made two statements out. They said the statements were useless, they wanted another statement.

Q Yes.

A And I refused to give it to them.

Q For how long and how many hours did they then question you that morning?

A From five to five and a half hours in the morning.

Q And they kept up this inquisition of question then —

MR. O'DONNELL: Just a minute. We object.

THE COURT: Yes.

MR. MORGENSTERN: I will withdraw it.

Q They then kept up this questioning?

MR. O'DONNELL: Just a minute. We want a ruling from the Court.

THE COURT: The Court sustained the objection. Counsel can't testify.

Q They then kept these questions up until —

MR. O'DONNELL: Just a moment. We object to that question. You have been leading this witness all along. If there was a jury I would have been objecting every time, but we do object now.

THE COURT: Yes, Counsel's questions are suggestive and leading. Objection sustained.

Q What then happened after the five or five and a half hours?

A Well, they took and they gave me K ration. I ate my chow.

Q What is a K ration?

A Well, it is a field ration.

MR. O'DONNELL: If the Court please, now, he has been referring to "they". If he can give the name or description of "they" we would like to know who "they" are.

Q All right, now, when you refer to "they", whom do you mean?

A Lt. Strano, Second Lt. Strano, C. I. D. agent.

Q Yes.

A And Lt. Urdinarrian.

Q Who else?

A The other two I didn't know.

Q You do not know their names?

A No.

Q Now we are back to the K rations. What did that consist of?

A Well, it consisted of a small can of cheese and six or eight biscuits and some chewing gum.

Q All right, now, how long did that take?

A About half an hour altogether.

Q And then what transpired or happened after that?

A Well, they started questioning me the same way they did in the morning.

Q And for how long a period of time?

A About five hours.

Q Now, will you describe just what they did and how they acted in the afternoon session?

MR. O'DONNELL: They?

Q By "they" I mean the C. I. D. officers.

MR. O'DONNELL: No. Name them.

Q What they, the C. I. D. officers, whoever they were, did. I want you to name them. What did the C. I. D. officers do? Name them and describe what they did.

A Well, Lt. Strano and Lt. Urdinarrian and the other two I said I didn't know, anyhow these two, they was walking around me firing numerous questions at me and asking what other dealings I had with them. And I told them I didn't have no dealings with them. I had already signed two statements. I wanted them the way they were. But they insisted on getting another statement. They said, "We will get a statement out of you".

Q They said, "We will get a statement out of you"?

A Yes, that is right.

Q By "they" you mean the names you have just referred to?

A Yes, sir.

Q Then what time was it that they were through questioning you?

A Sometime about five-thirty or six o'clock.

Q Then what happened? Where were you taken then?

A I was taken back to the D. T. C.

Q Now, do you recall whether or not you visited the C. I. D. office again at any time?

A Yes, four other times after the first time.

Q Well, now, do you recall how many days apart from the first time you were there?

A Some of them were two and three, and some were even four days apart.

Q Now, the second time that they took you there, will you describe the procedure and who was there when they questioned you?

A Well, Urdinarrian, Lt. Urdinarrian, C. I. D. agent.

Q Yes.

A He was over there. And Lt. Straño — he wasn't there the second time.

Q Yes.

A There was the other ones in there. I didn't know their names.

Q What time did they get you that morning?

A About seven o'clock.

Q And they took you from where?

A D. T. C.

Q That is the Disciplinary Training Center?

A That's right.

Q Will you describe the place that you occupied at the D. T. C.?

A Well, it was a small area.

Q I mean your particular room: What was it?

A A pup tent.

MR. WINDOM: Object.

MR. MORGENSTERN: I am trying to get the picture here.

MR. WINDOM: What value is it?

MR. MORGENSTERN: It is very important.

THE COURT: He may answer.

Q Will you describe the room which you occupied at the Disciplinary Training Center?

A Well, we had a pup tent. There was two guys occupying each pup tent.

Q Yes.

A We slept on a wooden platform they had built just above the ground.

Q Yes. All right, then, they called for you this second time. What time did you say it was?

A Oh, about six or six-thirty they called for me.

Q At this time there was Lt. —

A No. The two guards took me down there.

Q Yes.

A And turned me over. There was Lt. Urdinarrian.

Q Urdinarrian.

A Two other guys.

Q Now, for how long did they question you that morning?

A Well, it was from seven o'clock that morning then until about twelve or twelve-thirty.

Q All right, then what happened after they completed their question?

A Well, then I got my field ration again. I ate and I was being questioned again.

Q Then what time were you through being questioned that afternoon?

A About five-thirty or six.

Q Then what would be the procedure after that?

A Well, I went back to D. T. C.

Q When you say you went back, you —

A The two guards that were from the D. T. C. Company — they were the ones to take me back.

Q All right, then when was it the next time that you went through this procedure?

A Just a couple of days later.

Q What time did they call for you on that morning?

A About the same time, about six — six-thirty.

Q And they took you from where to where?

A Two guards took me from D. T. C. back up to the C. I. D. agents' office.

Q Who was there on the third morning?

A Well, Lt. Strano was there, and Lt. Urdinarrian was there, and the other two guys were over there.

Q By the other two guys, you mean the other two —

A The other two C. I. D. agents. I don't know their names.

Q And for how long a period of time did they then question you the third morning?

A About five hours, I'd say.

Q And what happened after that?

A Oh, I went back to my field ration. They started questioning me all over again, and they turned me loose about six — six-thirty.

Q By turning you loose, you mean what?

A They turned me loose back over to the two guards that took me from the D. T. C. Company.

Q Yes.

A And they brought me back.

Q All right.

A Back to D. T. C.

Q When was the next occasion when they brought you down to that place?

A About a week.

Q What time did they get you that morning on the fourth occasion?

A About six — six-thirty.

Q They took you down to the same place?

A Yes.

Q Who was there on the fourth morning?

A Lt. Strano and two other C. I. D. agents.

Q And they had you there for how long?

A The same amount of time, about for five hours in the morning and the same amount in the afternoon.

Q What were they doing during that period of time on the fourth morning?

A They were still questioning me with questions.

Q And did they keep that up continuously?

A Yes.

Q And what happened at noon?

A I went back to eat my chow in the little office they had over there, and then they called me out again and questioned me again.

Q And those questions kept up for how long after that?

A About five hours.

Q And then about what time was it on the afternoon of the fourth day that you were turned over to the guards?

A About six.

Q. Now, when was the next time that you were taken down to the C. I. D. office?

A I would say around the 25th of September.

Q And about what time of the morning was that?

A They picked me up at seven o'clock that morning.

Q And they brought you from the D. T. C. to the C. I. D. office?

A That's right.

Q What time did you get there that morning?

A About seven-thirty.

Q Now, how were you feeling during all this period of time that they took you to this place?

MR. WINDOM: Object.

THE COURT: What do you claim for this, how he was feeling?

MR. MORGENSTERN: Well, I should like to have him give an expression as to this —

THE COURT: He might have had feelings which were due to other causes, other reasons.

MR. MORGENSTERN: I will withdraw it and I will come back to it.

THE COURT: If he received any mistreatment or anything of that character you might show that, but the fact of what his feelings were is not material unless they resulted from the acts of those who had him in charge. The objection is sustained.

Q Now, you say then on the fifth day it was around seven-thirty in the morning?

A That is right.

Q That you arrived at the C. I. D. office with the two guards?

A Yes.

Q Who was present on that morning?

A Well, Lt. Urdinarrian and Lt. Strano, and there was two other C. I. D. agents there.

Q Now, what was the procedure that morning?

A Well, they asked me to make a statement and I told them, "I ain't going to make no statement, because I al-

ready made two statements". They said, "Well, just review that second statement you gave Sergeant Tuck". So I was telling them the statement I was giving Sergeant Tuck. There was one C. I. D. agent over there — that was the fifth one in the room that came in — he wrote down the statement. I gave them about a one page statement, that was oral, what I told them. After he had the statement all typed up he had about two and a half pages of it and I refused to sign it.

Q And they questioned you again after you made that statement which you refused to sign?

A Yes, sir.

Q Until what time?

A Until noon.

Q Then what happened at noon?

A I ate my chow.

Q Now, describe after you had your chow what happened then in the afternoon after they had prepared a statement for you?

A Well, they had the statement over there in front of them and told me I had better sign it. I said, "I ain't".

Q They asked you what?

A They said I am going to sign the statement. I said, "I ain't".

Q Yes.

A So then they started with the arm method, twisting.

Q What do you mean by "the arm method"?

A Well, they put my arm behind my back and was lifting.

Q Well, you just describe there what they did?

A Well, they had a chair this high (indicating) and they had my hand behind my back.

Q Yes.

A They asked me to sign it and I refused.

Q Who was "they"?

A Lt. Urdinarrian.

Q Urdinarrian.

A Yes.

Q All right, and when you refused to sign it and your hand was behind your back, then what happened?

A Just lifted it up.

MR. O'DONNELL: Let's get all the names of the persons and what they did now.

Q All right, now, on this day, on the afternoon of the fifth day, who was present?

A Well, Lt. Strano and Lt. Urdinarrian. There was two other C. I. D. agents in the room when I got in there, but I didn't know them.

Q I see.

A Then the fifth one came in in the morning to make out the statement for them.

Q Well, this fifth one that came in the morning — was he also there in the afternoon?

A No.

Q I see. All right, now, there were these four men you just described, and you had refused all morning, you say, to sign that statement which they prepared for you?

A That's right.

Q Then describe what they did when you had your — who placed your arm behind your back, behind the chair, rather?

A It was one of them C. I. D. agents. I don't know their names.

Q What did he do?

A Every time I refused he lifted the arm up a little bit.

Q Well, now, as he lifted the arm up a little bit what did you do?

A Well, it started paining.

Q What did you say?

A It started paining.

Q Well, now, how far did they go with that?

A Well, it took up about — they did it about twelve time, I'd say, at least. Then I told them I would sign the statement.

Q After they —

MR. O'DONNELL: Who is "they"?

THE WITNESS: Lt. Urdinarrian

Q Who was the one that did it about twelve times?

A What?

Q Who was the one that did it about twelve times?

A I don't know his name.

Q Yes. Then what did you do after that?

A I told them I would sign the statement.

Q Now, when you told them you would sign the statement, what did the C. I. D. officer who held your arm — what did he do?

A He let go.

Q Did they then give you the statement to look at?

A They brought me in the room and Lt. Strano — he had the statement and he held it out to me and told me to read it.

Q Now, when he held it out to you and told you to read it, can you describe in what manner they told you to read the statement which they had at that time given to you and which you said you would sign?

A Well, Lt. Strano had it in his hand like this (indicating) and he told me to begin where it said, I, Thomas A. Gusik. —

Q Now, when he had it in his hand like that, what part of the paper then was folded?

A The top part.

Q Did you at any time read that top part of that statament which they offered you to read?

A Yes.

Q What was the first word of the statement that you had read?

A Did I have read?

Q Yes.

A Where it said, "I, Thomas A Gusik — ". That was the first part I read.

Q Yes, sir.

A I am pretty sure that is what it said.

Q Now, at the time that you signed that statement did they tell you, or did they advise you, of your rights concerning signing that statement?

A No, sir.

Q Did you have anybody present with you to advise you?

A No.

Q Did they tell you that you did not have to sign that statement?

A No.

Q Did they read the Articles of War 24 to you?

A No.

Q Did they take a book like this, showing you a Manual for Courts-Martial, U. S. Army, 1928, and open to the Articles of War 24 and read it to you before you signed that statement?

A No.

Q During the period of the five different days that you describe was the Articles of War 24 ever read to you from the Manual of Courts-Martial?

A No.

Q During the time of the questioning on the statement which they wanted you to sign, was there any conversation had as to what was contained in that statement?

A Yes.

Q Will you relate what the conversation was concerning what was contained in the statement?

A Well, there was a lot of parts in the statement that wasn't altogether right in there. There was one part where — we had an Italian labor camp in our depot.

Q Yes.

A There was Italians around that area all night long. They used to work at the Officers" Club and Motor Pool and various parts of the depot like that. That's where I first met Franco, over there in that Italian labor camp. He worked there for a while. They asked me if I ever saw Franco, and I says, "Yes."

They said, "Where was he?"

I said, "He was in the area."

He says, "He didn't have no business there, did he?

I said, "He worked in the Italian labor camp."

He said, "Still he was inside your area?"

MR. O'DONNELL: Just a moment. I can't see how this is responsive to your question.

MR. MORGENSTERN: Well, there was a discussion on the question of what was contained in the statement, and he wants to describe, without me mentioning or referring to it, what took place.

THE COURT: Well, was this all in the statement, or is this merely conversation which took place?

MR. MORGENSTERN: This is conversation pertaining to something which was in the statement. I will withdraw that.

Q Now, let me ask you this question: Was there anything in that statement, or any statements in that alleged confession of yours, which you did not tell them to put in?

A Yes.

MR. O'DONNELL: Object. Is this statement in existence?

MR. MORGENSTERN: Yes.

MR. O'DONNELL: Is there a written statement?

MR. WINDOM: It is in evidence.

(recess taken.)

Q Now, what took place, Tom, after you signed that statement?

A Well, I was taken back to D. T. C. and I remained there until October 9th, when I was supposed to be Court-Martialed. And I saw my defense counsel October 7th.

Q Just a minute. I will ask you a question about that. Now, at the time that they had you read the statement and before you signed it, was that a true and correct statement that you had given them?

A No.

Q You were taken then back to the Disciplinary Training Center?

A That's right.

Q How long were you kept there?

A Until October 9th, when I was taken out for trial.

Q Now, prior to the time of your trial were you visited by any person?

A Yes — my defense counsel on October 7th at ten o'clock that night?

Q Who came there? What was the name of the person, and for how long a period of time did he talk with you?

A Lt. Burks. He came there about ten and he left about ten minutes after ten — approximately ten minutes.

Q For how long a perid of time was he with you?

A About ten minutes.

Q Now, prior to that time did you make a request for the appointment of a defense counsel?

A Yes, sir, I did.

Q To whom did you direct that request?

A To the C. I. D. agent. I wanted Lt. Radar Ryan from the 88th Infantry Division. He was in Trieste.

Q Talk a little slower.

A I requested Lt. Urdinnarian of the C. I. D. that I wanted Lt. Radar Ryan from the 88th up in Trieste.

Q Yes.

A I would like to have him for a defense counsel.

Q Why did you make the request for Lt. Radar Ryan?

A Well, he was a good lawyer, what I heard of him. He was a lawyer in civilian life. And what I knew about Lt. Burks, it was —

Q Now, you made the request of whom, did you say?

A Lt. Radar Ryan.

Q Who did you make the request of to get Lt. Ryan for you?

A Lt. Urdinarrian, C. I. D.

Q All right, and then what did he tell you with reference to getting Lt. Ryan as your defense counsel?

A Well, he said he would see what he can do. Then on the night of October 7th Lt. Burks came to see me.

He said he was supposed to be my defense counsel; that they can't get Lt. Ryan; that a lot of the officers has been taken up to Germany. So he said, "Now, I am supposed to represent you. You are going to Court on the 9th."

Q Were you given any papers?

A No.

Q What did you say? Were you given any papers?

A You mean, when Lt. Burks came to see me?

Q Yes.

A Not when Lt. Burks came to see me I didn't get any papers.

Q Did you get any papers before he came to see you?

A Yes.

Q What was that that you received?

A It was a charge sheet.

Q Now, when you talked with Lt. Burks for ten minutes — is that right?

A Approximately ten minutes?

Q That was on what date?

A October 7, 1947.

Q When were you going to trial?

A October 9, 1947.

Q Did he at any time explain to you the meaning of a plea?

A No.

Q Did he inform you of your rights to introduce evidence?

A No.

Q Did he inquire of you as to any of the facts of the case?

A No.

Q Did he ask you whether or not you desired to call any witnesses?

A No.

Q Did he make an investigation of his own in your behalf?

MR. O'DONNELL: Object.

Q If you know.

MR. O'DONNELL: We object.

THE COURT: If he knows, he may answer.

MR. O'DONNELL: We object to the form of the questions as they are put, for the reason that they are all leading.

THE COURT: Yes.

MR. O'DONNELL: Why doesn't he permit the witness to testify?

THE COURT: Yes. The questions are leading and suggestive. Let this witness tell what was done, if he knows.

Q During the time that he talked with you, will you relate the time he took and what he talked with you about?

A Well, when he came up to see me he said his name was Lt. Burks, that he was representing me at my Court-Martial which I am supposed to receive October 9th.

I said, "I asked for Lt. Radar Ryan."

He said, "Well, Lt. Radar Ryan and a lot of other officers from the 88th — he may have been called to Germany, been transferred to Germany, so we couldn't get them. I am going to represent you at your Court-Martial."

I asked him about this here third degree that I got down there by the C. I. D. He said if I can't prove it I had better not say anything about it.

Then there was another guy he wanted to talk to. He was supposed to get tried on the 8th. So then he called me out. That's about all we talked about when we were in there. He read the maximum penalty.

Q What?

A He said the penalty of my crime carries a death sentence. That was all he said.

Q Lt. Burks said that to you?

A Lt. Burks said that, that's right.

Q That was the extent of the conversation and preparation of representing you?

A Yes, sir.

MR. WINDOM: I object.

Q On the 9th of October?

THE COURT: Yes. The question is suggestive and leading. Objection sustained to the form of the question.

Q And then what happened on the 9th day of October?

A Well, I left D. T. C. at eight o'clock that morning and went to Leghorn to get Court-Martialed. I was supposed to be Court-Martialed at ten o'clock, but they postponed it until one o'clock that afternoon. I saw Lt. Burks about a quarter to one that afternoon on the 9th of August — or, the 9th of October.

Q Then what took place there?

A Then the Court-Martial took place. They called us into Court.

Q It started at what time, did you say?

A Approximately one o'clock.

Q One o'clock?

A Yes, sir.

Q In the afternoon?

A Yes, sir.

Q On the 9th, did you mention?

A That's right.

Q How long then did the Court-Martial proceedings last?

A Until about five o'clock.

Q Will you then relate as best as you possibly can what took place at this trial of the Court-Martial proceedings?

MR. O'DONNELL: Object.

THE COURT: Why?

MR. O'DONNELL: Well, doesn't the record show that?

THE COURT: It shows your side of the case.

MR. O'DONNELL: Doesn't it show his side of the case?

THE COURT: It may and it may not. Objection overruled. He may answer.

MR. O'DONNELL: Exception.

MR. MORGENSTERN: He wants me to bring it out in questions. Then he objects it is leading. So I should like to have him explain it in his own words.

Q Will you describe as best you can what took place at that Court-Martial proceeding?

A Well, after all the witnesses were heard over there I was asked by Colonel Cordaro if I wanted to take the stand and Lt. Burks called me aside and he said he wouldn't advise me to take the stand; that if I would I may get convicted of murder that I was charged with.

THE COURT: To do what?

THE WITNESS: He says I may get convicted if I take the stand.

Q That was the advice that was given to you by your defense counsel?

A That's right.

Q During the time that some of the witnesses testified did you make any request of your defense counsel?

A Yes, I did.

Q What was that request or requests?

A Well, there was two requests I asked him. One was for Private Holden. On the 12th of August when I was on guard—and on the 13th I was on guard also, for a 24 hour period.

Q Talk a little louder. We have got to hear you.

A For that 24-hour period from twelve o'clock — from the 12th of August at one o'clock until the 13th of August at one o'clock I was on guard and Private Holden was on with me, not on the same relief I was but he was on the same guard tour. And the statement he wrote that on the 12th of August I went out with him on pass between seven and nine and we made a deal with these two Italians — and I told him to question that statement; that it is false; I could prove that on the 12th of August that I was inside the camp. But he never did anything about it.

Q Who never did anything about what?

A Lt. Burks — he never bothered to question him.

Q He did not cross examine that witness to indicate that it was a false statement he was making?

A That is right.

Q Is that what you are trying to convey here?

A Yes.

MR. O'DONNELL: Will you please let him convey it and you stop conveying it? We object.

THE COURT: Sustained.

Q Now, what else did you talk with him?

A I talked to him about the second statement that Private Zahurones made.

Q Yes.

A The statement he signed, he says he was shooting above the grass where he saw it moving, and when he got up in Court he said he was shooting up in the trees because he didn't want to hit nobody. I asked him to question that statement, too, but he never did.

Q The statement which you had made — was that introduced at the trial, at the Court-Martial trial?

A Which statement, the first, second or third?

Q Well, was there a first statement introduced?

A Yes, It was my —

Q The first statement you made?

A No, not that one. The only statement that was introduced was the third one I made. The first two, I never seen anything about them.

Q Did you discuss that matter with your defense counsel, about what he was to do when the statement was introduced?

A No.

Q When was it you discussed with him the matter as to this statement that you made, the third statement you made?

A Well, that I discussed with him October 7th. I told him how they got the statement out of me.

Q Yes.

A But he says if I can prove it it would be better for me if I wouldn't say anything.

Q So he never said anything?

A That's right.

Q About that statement?

A That's correct.

Q Did the C. I. D. agent testify?

A Yes.

Q What, if anything, did your defense counsel ask of the C. I. D. agent?

A I don't remember what he asked them.

Q Did you want to take the stand?

A Yes, I did.

Q And for how long a period of time did you talk with your defense counsel trying to tell him that you wanted to take the stand?

A Well, just a couple of minutes, about two minutes at the most.

Q Were there any witnesses, to your knowledge, subpeonaed in your behalf at this Court-Martial proceeding?

A There was none.

Q Were you ever given the opportunity of being present when any of the witnesses were examined?

A No.

M. WINDOM: Is that at the Court-Martial?

MR. MORGENSTERN: No. This is prior to the time of the Court-Martial, when the other witnesses had given their statements.

MR. WINDOM: Is there any claim of any right to be present, Mr. Morgenstern?

THE COURT: There is nothing in the record to show that they were examined prior to the time.

MR. WINDOM: Yes, Your Honor, there is. In Respondent's Exhibit Number 1 there is a full report of the preliminary investigation, but the defendant has no

right to be present represented by counsel or anything under military procedure.

THE COURT: The Court has not had the opportunity to examine the record.

MR. WINDOM: It is like a grand jury investigation, actually.

MR. DIRENFELD: I think it is clear that Article of War 70 does allow the defendant to cross examine witnesses against him.

MR. WINDOM: Not at the time of the investigation. You know that.

THE COURT: Let us proceed. The Court will permit the witness to answer.

Q Were you ever given the opportunity at the time of the investigation to cross examine any of the witnesses?

A No.

MR. O'DONNELL: Now, if the Court please, I think that may be confusing to someone that is not here as to his opportunity to cross examine. Are you talking about at the trial, the Court-Martial? Will you please make the record clear?

THE COURT: For the purpose of the record, the Court suggest that you be more specific.

Q At the time of the investigation of the witnesses who appeared against you in Court, were you ever given the opportunity to cross examine —

MR. WINDOM: Mr. Morgenstern. may I interrupt a minute?

MR. VOORHIS: They don't investigate witnesses, Your Honor.

MR. WINDOM: Just state in connection with the A. W. 70 investigation.

MR. DIRENFELD: May I read a part from Article of War 70? Article of War 70 provides in part that no charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth, form of

charges, disposition of case, and so forth. At such investigation full opportunity shall be given to the accused to cross examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. Now, this is in the pre-trial investigation pursuant to Article of War 70.

MR. WINDOM: Don't worry, it was done, Judge.

THE COURT: Well, you just stated a moment ago that he wasn't permitted to.

MR. WINDOM: All right, now, as I understand it, he is talking about witnesses. The question is, do you mean A. W. 70 investigation?

MR. MORGENSTERN: That is right, the pre-trial investigation. That is what I am referring to. Articles of War 70 has not been complied with. That's what I am trying to have the witness show.

THE COURT: Well, the Court understood counsel for the Government to say that he had no right to cross examine. Now, do you dispute the section just read?

MR. WINDOM: We stand right on the record that is already in evidence. He waived that right. I don't want to disclose the cross examination at this time.

THE COURT: This is not a game of checkers or chess. We are trying to get the facts. Now, I want to know whether or not you are disputing the existence of the Article of War?

MR. WINDOM: He read it correctly.

THE COURT: Correctly?

MR. WINDOM: Certainly.

THE COURT: Go ahead.

MR. MORGENSTERN: May it please the Court, on the question of the defense counsel, there are certain requirements that have to be met under the Articles of War as to what the defense counsel is to do. Now, the only method and the only way that I can get it is to ask

direct questions as to whether or not the defense counsel performed his duties as a defense counsel in any manner whatsoever, and I must describe whether he had performed certain things. The witness can answer yes or no to that, but it is the only method by which we can have the witness testify as to whether there was a defense counsel, or if there was, whether he actually acted as his defense counsel.

THE COURT: You may go ahead with your examination.

The Court can't anticipate what you intend to do.

Q Did your defense counsel or did he not inquire from you as to whether you desired to call any witnesses?

A No.

Q Did he or did he not interview witnesses on your behalf?

A No.

Q Did he or did he not object to highly prejudicial and objectionable questions and answers at the trial?

MR. O'DONNELL: We object.

THE COURT: Yes.

MR. O'DONNELL: It is a pretty big question for this boy to answer.

MR. MORGENSTERN: Well, it was a pretty big thing that was done to this boy.

THE COURT: Well, is this defendant able to judge whether or not a question is prejudicial?

It is rather a broad statement. The objection is sustained.

MR. MORGENSTERN: Exception.

Q Referring again to your defense counsel, I will ask you did he or did he not inform you of your right to counsel of your own selection?

A No.

Q Did he or did he not render any assistance to your wishes in securing counsel of your own selection?

A No.

Q Did he or did he not make any notes of your case when he talked to you?

A No, he didn't.

Q Did he or did he not obtain the names and addresses of persons who may have had some knowledge of the facts in your case to help you in your defense?

A No, he didn't.

Q Now, I will ask you at this time whether or not, referring now to the investigating officer — who was your investigating officer?

A I don't know his name.

Q Well, I will ask you whether the investigating officer informed you — did he or did he not inform you of your right to introduce evidence?

A No, he didn't.

Q I will ask you concerning the investigating officer whether he inquired from you whether or not you desired to call or cross examine any witnesses?

A No.

Q Referring again to the investigating officer, did he or did he not inform you of your right to have counsel of your own selection?

A No.

Q I will ask you, referring again to the investigating officer, whether he rendered any assistance in your wishes in securing and consulting counsel of your own selection?

A No, he didn't.

Q Now, you stated then that you talked with your counsel about taking the stand; is that right?

A That's right.

Q And what did he say to you?

A He told me I would be better off if I didn't take the stand; that if I would be convicted of murder.

Q What else did he say to you?

A He said he will get me off as light as he can.

Q Then what happened during the Court-Martial proceedings after that?

A Well, they called a recess, called me in and read me my time.

Q And what?

A And read me the time I got, my sentence.

Q Well, were you asked by the members of the Court-Martial as to any previous record?

A As of what?

Q Whether you had any previous record?

A No.

Q And you say they then came back and read you the time you got?

A Yes.

Q Well, what did they say? What was the expression they used? What did they say to you?

A Well, they said I was discharged from the Armed Forces, forfeited all pay due and to become due, and been sentenced to hard labor for the rest of my natural life.

Q Who said that to you?

A Colonel Cordaro.

Q That was from the —

A He was the President of the Court-Martial Board.

Q Now, after you were sentenced what, if anything, did your defense counsel say to you?

A Well, he came up to me, tapped me on the shoulder, and said, "Don't worry about the time you got."

Q Now, did you get a copy of the transcript of the proceedings at any time after the Court-Martial proceedings?

A I got a copy that my counsel gave me two weeks ago Saturday to read at Chillicothe. That was the first time I had ever seen it.

Q Now, when you refer to your counsel, that the counsel gave you that copy two weeks ago Saturday, which counsel do you mean?

A The counsel that is representing me now.

Q In this Federal Court?

A That is right.

Q Before Judge Underwood?

A That's correct.

Q How often or how many times have your present counsel in this Court talked with you concerning the facts of your case?

A I believe they talked to me in November of '47.

Q And where was that? You say in November of 1947?

A Yes.

Q Where were you stationed then?

A I was in Green Haven, New York, in the Army D. V.

Q Do you recall which lawyers representing you came down to Green Haven, New York, to talk to you?

A I believe you came up. There was Leo Chimo. There was three other ones. I can't get their names right now.

Q But you can designate five of this group of lawyers who came to see you in Green Haven; is that right?

A That's correct.

Q Where are you stationed at the present time?

A At Chillicothe.

Q You say that two weeks ago a committee of those lawyers came to see you at Chillicothe?

A Yes, sir.

Q Do you know who those lawyers were?

A Well, they are seated at the table right now.

Q Well, now, I will just ask you, was Mr. Picklow there?

A Yes, he was.

Q Was Mr. Price there?

A Yes, and you were there.

Q I was there?

A Yes.

Q And the Secretary of our legal committee, Chester Koch?

A That's right.

Q And those are the only two occasions that your lawyers ever discussed this case with you?

A Yes.

Q Once at Green Haven and once at Chillicothe?

A That's right.

Q Is that right?

A Yes.

Q Now, in this courthouse building you also had a conversation with part of your legal representatives?

A Yes, I did.

Q I will ask you, was Mr. Picklow one of them that talked to you this morning in Federal Court?

A No, he wasn't.

Q Well, Mr. Lysowski?

A Yes, he was one of them.

Q This gentleman here, Mr. Picklow?

A Yes, I believe he was there, too.

Q They talked with you this morning, is that right?

A That's right.

Q Now, coming back to the statement which you had signed and explained how you signed it, I will ask you whether or not on the 13th day of August about three-thirty A. M. in the year of 1947 you murdered two men?

A No, sir, I didn't.

Q I will ask you what officially were you doing at that time referred to?

MR. O'DONNELL: I Object.

THE COURT: What do you mean by "officially"?

MR. MORGENSTERN: Well, I will withdraw the question and ask this:

Q I will ask you whether you were on guard duty as an American soldier guarding American lives and property?

MR. O'DONNELL: Object.

THE COURT: I think you have been all over that once. The record will show what he was doing, will it not?

MR. MORGENSTERN: What is that?

THE COURT: I say, the record will disclose what he was doing.

MR. MORGENSTERN: That is all.

THE COURT: Have you concluded your examination in chief?

MR. MORGENSTERN: Yes, Your Honor.

THE COURT: You may cross examine.

MR. WINDOM: The Government moves to strike the testimony of Mr. Gusik from the record.

THE COURT: The Court will reserve ruling on the motion. Proceed with cross examination.

MR. VOORHIS: Your Honor please, may we reserve cross examination?

(After discussion between Court and counsel cross examination of the witness was reserved.)

MR. VOORHIS: The Government moves to strike the testimony of Mr. Gusik from the record.

THE COURT: The Court will reserve ruling on the motion. Proceed with cross examination.

MR. VOORHIS: Your Honor please, may we reserve cross examination?

(Discussion between Court and counsel.)

THE COURT: In other words, you gentlemen are agreeing that the case shall be continued until September 8th?

MR. MORGENSTERN: That is right.

THE COURT: Wednesday, September 8th, at 10:00 o'clock; is that true?

MR. VOORHIS: That is correct, sir.

THE COURT: The Court will approve your agreement and the case will be continued until September 8th.

(Discussion between Court and counsel.)

MR. MORGENSTERN: Well, your Honor, may I at this time have this witness testify? The character witness will just take a few minutes. Then the record will have it and we won't have to bring him in again.

THE COURT: Very well.

AND ALSO,

George Michael Manosky,

called on behalf of the petitioner, being first duly sworn, testified as follows:

EXAMINED BY MR. MORGENSTERN.

Q Will you state your name, please?
A George Michael Manosky.
Q George, how old are you?
A I am nineteen.
Q Where do you live?
A 3482 East 99th Street, Cleveland, Ohio.
Q Do you know Thomas Gusik?
A Yes.

MR. VOORHIS: Your Honor please, I dislike to interupt, and maybe it is anticipatory, but the witness is offered as a character witness. I don't wish to deprive the petitioner of offering anything in this case at any time which might assist him to present his case to you. I urge that there is only one issue before you in the petition for a writ of habeas corpus — that is the legality of the confinement of the petitioner. His guilt or innocence is not in issue. The length of the sentence is not in issue. You have no discretion as to the length of the sentence in the matter. Whether his character be good, bad or indifferent should not affect the legality of the confinement.

THE COURT: What do you claim for character evidence in this case? What does it have to do with the issue presented to this Court: You are claiming a violation of the due process clause.

MR. MORGENSTERN: That is right, and the statements that are being made by the witness —

THE COURT: Well, are you attempting to fortify your own witness?

MR. MORGENSTERN: No. I am attempting to indicate that he has a reputation for truthfulness and veracity.

THE COURT: His reputation is not a issue in this case.

MR. MORGENSTERN: I mean his truthfulness and veracity — not his general reputation. I want to indicate by this witness that what Thomas Gusik says is believed, and when Thomas Gusik made the statements as he made on the stand, that his reputation for truth and veracity is such that he is believed and has been believed in the community where he lives and in the schools where he attended by those who were with him and his friends.

THE COURT: Well, you are certainly creating new problems for this Court in offering a character witness at this time. However, since the Court permitted the other to go in under a reserved ruling and the witness is here, the Court will make the same ruling and allow the witness to answer.

Q Now, how long have you known Tom Gusik?

A About five and a half years.

Q And did you attend —

A Attended Nathan Hale Junior High School with him.

Q Where is that located?

A It is on East Boulevard in Cleveland, Ohio.

Q And during the period of time you associated with Tom did you know his friends and those whom he associated with?

A Yes, I do.

A And have you the means of knowing what his reputation is for truth and veracity?

A I do.

Q And what is that reputation?

A Well, I guess it's about the best.

MR. MORGENSTERN: That is all we wanted to go into.

MR. WINDOM: The Government moves to strike the testimony.

(Witness excused.)

And thereupon the further hearing of the case was adjourned until Wednesday, September 8th, 1948.

WEDNESDAY MORNING SESSION

September 8, 1949

PRESENT:

Mr. Morris Morgenstern,
Mr. John Price,
Mr. Bernard B. Direnfeld,
Mr. E. J. Sklenicka,
Mr. John Baker,
Mr. Francis Picklow,
Mr. Anthony Lysowski,
Mr. James R. Spellman,
on behalf of the Petitioner;

Mr. R. O'Donnell,
Mr. Loren G. Windom,
N. R. Voorhis, Lt. Col.,
Thayer Chapman, Lt. Col.,
on behalf of the Respondent.

AND ALSO:

Thomas A. Gusik,

resuming the stand for cross examination, testified as follows:

CROSS EXAMINATION

By Mr. Voorhis:

Q Your name is what?

A Thomas A. Gusik.

Q You are the petitioner in this case?

A I am.

Q And you testified at some length at the last hearing in this case?

A Yes, sir.

Q And at that time you were under oath?

A Yes, sir.

Q And you continue to testify under oath?

A Yes, sir.

Q At the time when you talked with Lt. Burks, who told you he was to be your defense counsel? Did he have any papers present with him?

A I don't remember, sir.

Q At your trial Lt. Burks was present?

A Yes, he was.

Q At all times during the trial?

A Yes, he was.

Q And you and he sat close together?

A Yes, sir.

Q Did you sit close enough together to talk with each other during the course of the trial?

A Yes, sir.

Q Did Lt. Burks have any papers with him at that time?

A Yes, sir, he did.

Q Do you know what those papers were?

A I don't remember what a few of them were. One of them was the Guard Roster and the other one was the statement of charges I had against me.

Q Did he have the statements of any witnesses?

A I don't know.

Q You testified that you called to his attention that one witness on the stand stated that he fired high or fired into the trees, whereas in a pretrial statement he had stated that he fired into or over the grass?

A That's right, sir.

Q Where did you see that statement?

A I saw that when my investigating officer came up.

Q What did your investigating officer show you beside that statement?

A He showed me two statements of the two Italian guards that were out on guard with me, and Hoagland's statement and Private Zahurone's statement.

Q Did Lt. Burks have copies of those statements?

A I don't remember, sir.

Q Now, when you were taken from the Disciplinary Training Center, which was located at or near Pisa —

A Yes, sir, that's right.

Q — to the C. I. D. office, which was located in or near Leghorn —

A Yes, sir.

Q — how long did it take you to go from the Disciplinary Training Center to the C. I. D. office?

A About a half hour at the most.

Q And who went with you on your first visit to the C. I. D. office?

A Two guards from the D. T. C. Company.

Q What day was that, roughly?

A I don't know, sir.

MR. MORGENSTERN: May it please Your Honor, at this time — pardon the interruption — I understand there is a witness here for the Government whose testimony probably in some manner will be affected by the testimony or statements made by Gusik. If such witness is in Court I should like to ask for an exclusion of that witness.

THE COURT: The Court has heretofore entered an order to the effect that all those who expect to testify in this case must retire from the court room and remain in the witness room until called. If there is anyone in the court room who expects to testify, you must retire at this time from the court room and remain outside.

MR. VOORHIS: Your Honor please, I did not recall your entering that order or anybody requesting the imposition of the rule.

THE COURT: Well, the Court had the impression that separation was requested. Well, if the Court did not make such an order, it will so order at this time, in view of the request of counsel.

Q Can you fix either specifically or generally the date of your first visit to the C. I. D. office?

A It was sometime in September, I believe.

Q Who did you see in the C. I. D. office?

A Lt. Urdinarrain.

Q Did you see anyone else?

A I did, but I don't know their names.

Q Well, now, tell us what happened that day in the C. I. D. office. About what time did you arrive there?

A About seven o'clock in the morning. When I arrived there Lt. Urdinarrain — he asked me about making a statement and I already told him I made a statement up in the Company Area. And he says, well, they lost that statement, that he wanted another one. So I gave him one statement. That was the second statement I gave him.

Q You gave that statement to Lt. Urdinarrain—

A Yes.

Q —your first visit to the C. I. D. office? Was that an oral statement or a written statement?

A It was a written statement.

Q And who wrote it down?

A Lt. Strano, I believe.

Q Did you sign it?

A No, I didn't.

Q How long did that take?

A Well, that was over the first day.

Q How long did it take?

A Oh, that first statement took about, I would say, about a half hour.

Q So by seven-thirty in the morning you had given a statement?

A No, sir. It took about half an hour before they wrote the whole statement down.

Q Well, you say you arrived there about seven in the morning?

A That's right.

Q By what time was the statement written down?

A Sometime in the afternoon.

Q Let's start over again. I am mixed up. You arrive at seven o'clock in the morning and in about half an hour you have made a statement?

A It took a half hour for the statement to be taken.

Q That brings us down to half past seven in the morning?

A No, it don't. I was being questioned from seven o'clock in the morning until that evening, and that evening I gave them a statement.

Q Well, then, about what time that day did you give a statement?

A Sometime after lunch time.

Q Well—

A I don't know the exact time.

Q At what time was it presented to you in written form, if it was presented to you?

A It was not presented to me. It was read to me.

Q It was read to you. When was it read to you?

A That afternoon.

Q About when?

A I can't recollect the time.

Q When did you leave there that day?

A About six o'clock, I'd say — five-thirty or six o'clock.

Q What did you discuss that day from seven o'clock in the morning until sometime in the afternoon?

A They were cross examining me about black market and dealings that are supposed to go on with these here Italians, and if I did have a deal with them. It all ran like that.

Q In other words, the general tenor of questioning was black market operations or thievery from the depot?

A That's right.

Q Did you gather that the thievery from the depot that was being investigated was very extensive?

A Yes, sir, I did.

Q How much in approximate value of material had been taken from the depot, if you understood during that questioning?

MR. MORGENSTERN: May I offer my objection at this time?

THE COURT: What is the purpose of this question?

MR. VOORHIS: It will be shown, Your Honor, that it had been discovered or disclosed that something over a million dollars worth of Government property had disappeared from the particular depot in which Gusik was stationed and that an extensive investigation was in progress which had developed that the materials could not have disappeared from the depot without the connivance of American soldiers stationed there operating with outsiders. Numerous suspects or witnesses had been interrogated over a period of several weeks. They were called in and questioned. Others were brought in. The leads were all fitted together. Leads were excluded and other leads were run down.

The purpose of my examination at this time is to show that the petitioner, just as he has now stated, was not grilled for hours on end about this particular homicide. I think it is pertinent, and he has already so stated.

THE COURT: Now, state your objection, please.

MR. MORGENSTERN: Well, if the Court please, the matter of what had transpired at the Army Depot is

a matter for the Army authorities to take the responsibility and not the boys who were placed on guard. And so far as it affects Private Gusik, who was an American soldier on guard trying to protect this property, the fault should not be placed at his feet. We say that he should not be made a sacrificial lamb for the errors of those at the Army Depot, and we say that it is immaterial to the question as to whether or not Thomas Gusik is the person who should have been charged with the murder of these black marketeers.

THE COURT: The objection will be overruled. The witness may answer.

MR. MORGENSTERN: Exception.

Q Do you recall my question?

A No, sir, I don't.

MR. VOORHIS: Would you read it back?

THE REPORTER: (Reading): "Question: How much in approximate value of material had been taken from the depot, if you understood during that question?

A Well, what I heard from the Provost Marshal, Master Sergeant Tuck, between the months of March and the time I was tried there was about a million dollars worth of Government property stolen.

Q Were statements made by others either involved or under investigation repeated to you during your questioning?

MR. DIRENFELD: I object, Your Honor.

THE COURT: How far do you expect to go with this black market investigation? If you expect to show a connection or an explanation to refute the charges that this man was grilled by the Army authorities, you may do so, but we are not going off on a tangent to determine whether there was a thousand or a million dollars worth of property stolen.

MR. VOORHIS: I am not concerned with the merits of these allegations or charges about pilfering and theft at the depot, Your Honor. What I am trying to point out is that he was one of numerous persons questioned with respect thereto. His defense is that he was on

guard—his defense at the trial—that he shot in the performance of his duties as a guard, as his counsel now state. The merits of that defense were determined at his original trial by court martial and are no longer open to us. They do raise the question and in their brief argue that he was improperly interrogated with respect to this isolated little incident—not little incident, it is an important incident—of shooting two Italians.

My purpose here is to show that he was not questioned solely on that, but he was questioned in the board field of the loss of over a million dollars.

THE COURT: Why not ask the witness directly instead of going into detail as to how much property was taken? Objection sustained to the question.

MR. MORGENSTERN: May I state at this time that we attempted in our direct examination to indicate that Private Gusik had made numerous arrests of black marketeers, of those who were stealing from the American Compound, and counsel for the Government objected and the Court sustained it.

THE COURT: Well, gentlemen, as the Court advised at the outset, the Court is sitting without a jury. It intends to admit the entire story. Whether or not it will be received and considered is a quesion to be determined by this Court at a future date.

MR. WINDOM: Your Honor, if I may buy a stack of chips in this argument: Your Honor has permitted Mr. Morgenstern and others to go in and attempt to show that all of this questioning was a coercion of this witness into some confession (which will be gone into later) ; that for many hours on many days he was questioned in respect to a single thing. Certainly it is competent now, with that same broad admission of the evidence, for the Government to show otherwise. And to limit us to asking him a question to which he knows the prompted answer certainly defeats any limit of cross examination.

THE COURT: Well, Colonial Windom, the Court is not foreclosing you. The Court is merely trying to circumscribe if possible an examination which may lead out in several directions.

MR. WINDOM: It is leading right down the record here, Your Honor.

THE COURT: Well, let us get down to the record and find out about it.

MR. WINDOM: I still think the question is proper.

Q Mr. Gusik, on that first examination by the C. I. D. how many persons questioned you?

A About three or four.

Q Who were they?

A Urdinarrian was one. There was Lt. Strano, and I didn't know the other names of the other two.

Q Now, you came in, you say, at seven o'clock in the morning?

A Yes, sir.

Q For how long were you questioned?

A Up to noon.

Q Did you have any breaks?

A Well, we just had a little. It wasn't even counted as a break. They just went in to get a drink of water or something.

Q Did Lt. Urdinarrain ever go about other business, do anything else?

A He was in and out of the room, if that's what you mean.

Q Were you ever left alone either in that room or another room?

A No.

Q Now, how long were you questioned that afternoon?

A I was questioned until they took that statement, and then they read it to me.

Q And did you have any breaks in the afternoon?

A I had time for lunch.

Q How long did you have off for lunch?

A I would say about fifteen minutes.

Q When did you come into the C. I. D. office in Leghorn again?

A A few days later.

Q What time did you arrive that day?

A About the same time.

Q About seven o'clock in the morning?
A Yes, sir.
Q Who was present that day?
A Urdinarrain was there.
Q Anybody else?
A There were three other men.
Q Who questioned you?
A Urdinarrain and the other three men.
Q What did they ask you?
A They asked me about what I was going to get tried for. They were asking me did—well, they gave me a lot —

MR. MORGENSTERN: I will have to ask you, Gusik, please talk a little bit louder. If you will sit up in the chair it might help. We do want to hear everything you say.

A (Continuing) Well, they were cross examining me about the charge I was going to be convicted on and asked me if I had any dealings with them. I said, "No".

They asked me if I had a deal for them to come in that night, and I said, "No". And then they started emphasizing the fact that I did have a deal with them and I did finally kill them.

Q Now, how long did that last?
A It lasted all afternoon and all morning long.
Q When did you go back to the D. T. C. that day?
A That evening.
Q What time?
A About six, six-thirty, something like that.
Q When did you come in again?
A A few days later.
Q Who was present?
A Why, there was Lt. Strano and two other men.
Q Was Lt. Urdinarrain there?
A No. I didn't see him.
Q What did they ask you about that day?
A The same thing they asked me a few days back—about the charge I was going to get convicted on.

Q Well, didn't they ask you about black market activities?

A No, not then. They just—well, they was just trying to tell me that I had a deal with these men, that I planned to kill them.

Q Didn't they repeat to you statements made by other American soldiers and ask you whether they were true or not?

A I don't remember that.

MR. DIRENFELD: Objection, if Your Honor please. It is statements he has reference to.

THE COURT: Overruled.

Q How long did you stay there that day?

A I stayed there all day and I left there about five-thirty, six o'clock.

Q Did you come down again?

A I came down again.

Q When was that?

A It was a few days later again, about a week, I should say.

Q Who was present that time?

A Lt. Urdinarrain and two other men.

Q Who were they?

A I don't know who the other men were.

Q What did they question you about that day?

A Well, the same thing they were questioning me on the day before that, or the week before that, I should say.

Q What was that?

A The same charges I was going to get convicted on —92.

Q In other words, your participation with Italians in thefts from the depot?

A No. It was in—that I planned to kill these men. That is what they brought up the fourth day on it.

Q They were asking you, were they not, whether you had made a trade with these Italians?

A Not that day.

Q Did you come down any other time?

A I came down the fifth time and the last. That was on the 25th, I think.

Q How long were you down this last time?

A I stayed there all day.

Q Who was present?

A Lt. Urdinarrain and three other men.

Q Who were the other men?

A I don't know.

Q What took place that day?

A Well, that day they got a statement out of me.

Q That's the statement you signed?

A Yes.

Q Now, when you returned to the United States you were up at the Disciplinary Barracks at Green Haven, New York, weren't you?

A Yes, sir.

Q For a short while. And you talked to counsel?

A Yes, sir, I did.

Q Some or all of the counsel who are present here in Court today?

A Yes.

Q Did you tell them your complete story?

A No, sir, I didn't. I didn't tell them about the fifth visit I had over there, because there was a member of the United States Army present.

Q Did he handicap you in any way from talking with your counsel?

MR. MORGENSTERN: Object, if the Court please.

THE COURT: Overruled. He may answer.

MR. MORGENSTERN: The implication is there.

Q Did he handicap you in any way from talking with your counsel?

A Yes, sir. I wasn't free to talk to them as I would have been if he had not been over there.

Q When did you next talk with counsel?

A At Chillicothe.

Q And what date?

A June 13th, I believe.

Q Did you tell them your complete story that time?
A Yes, sir, I did.
Q And then you talked with counsel once or twice after that, including the last time when you were in this Court?
A Yes.
Q In the morning of that day?
A Yes.
Q And the counsel we are talking about are your present counsel?
A Yes.
Q Some or all of them. What is Radar Ryan's name?
A I don't know his first name. His last name was Ryan. He was a Lieutenant in the 88th Infantry.
Q What is "Radar"? Is it a name or a nickname?
A No. Just a nickname they gave him.
Q Where did your counsel get the name A. B. Ryan, or A. D. Ryan, that they put in their brief?
A I don't know.
Q You never stated it in testimony, did you?
A No, sir, I didn't.
Q Now, in between your visits to the C. I. D. office what did you do?
A Well, I was called out a couple of times for line-ups, for black market line-ups, that is.
Q You were called up several times for line-ups?
A Yes.
Q Other than that, what did you do?
A Well, I worked in the mess hall.
Q Were you treated any differently than other people up in the D. T. C.?
A No. We were all treated the same.
THE COURT: What do you mean by "line-ups"?
THE WITNESS: Black market line-ups, sir.
Q You mean, for identification purposes?
A Yes.
Q You and others were —
A Yes.

Q — led out and people looked at you?

A That's correct.

Q To see if they could identify you or somebody else in the line-up?

A Yes, sir.

MR. VOORHIS: Might I ask one of our witnesses to come into the Court room for identification purposes?

THE COURT: You may call the witness. What is his name?

MR. VOORHIS: I would rather not state the name, sir. I would rather have Colonel Chapman go out and ask him to come in.

(Thereupon a man was brought into the court room.)

THE COURT: You may step inside the rail if you so desire.

MR. VOORHIS: Stand up here where he can get a full-length view of you.

Q Do you know that man?

A Yes, sir, I do.

Q Who is it?

A Lt. Urdinarrain, C. I. D.

Q Now, he is the person that you have testified directed somebody to twist your arm.

A Yes, sir, I did.

Q And he is that person?

A Yes, sir, he is.

Q And forced you to sign a statement?

A Yes, sir.

MR. DIRENFELD: If your Honor please, we object to these questions in the presence of Urdinarrain. We have no objection to him being identified.

THE COURT: Yes. The Lieutenant may now retire if you are through with him.

MR. VOORHIS: I think that was part of the identification.

THE COURT: It is a very peculiar identification.

MR. VOORHIS: We have no further questions, sir.

REDIRECT EXAMINATION
by Mr. Morgenstern:

Q You stated they had you and others in a line-up on black marketeering; is that right?

A Yes, sir.

Q Were you at any time ever picked out at any of the line-ups for black marketeering?

A No, sir.

Q Were there others, without mentioning names, picked out?

A Yes, sir, there were.

Q Did you at any time, referring to black marketeering, enter into any activities of black marketeering?

A No, sir, I didn't.

Q And you unhesitatingly and fearlessly state that that Lieutenant who appeared before you this morning is the one who ordered the twisting of your arm behind your back before you signed a statement?

A Yes, sir.

MR. VOORHIS: Objection.

THE COURT: Just a moment.

MR. VOORHIS: Is this recross?

THE COURT: Sustained. You are not testifying. The witness is sworn to testify.

Q You had, as stated, signed a statement under certain circumstances; is that correct?

A Yes, sir.

MR. MORGENSTERN: May I ask for the original of that statement if the Government has it, or a copy of the original, if it please the Court?

MR. VOORHIS: In Exhibit A there is a photostat of it.

MR. MORGENSTERN: At this time, if the Court please, counsel for Gusik will now rest his client without further questioning.

THE COURT: Very well, you may call your next witness. Does the petitioner rest, or do you have further witnesses?

MR. MORGENSTERN: Now, may it please the Court, at this time we will rest, reserving, of course, the right to recall Gusik during the course of the trial.

THE COURT: Is there objection?

MR VOORHIS: I don't know the purpose of the reservation of a right to put on a case in chief after resting.

THE COURT: Have you completed your case in chief?

MR. MORGENSTERN: Excepting, Your Honor, for one thing. At this time we desire to call upon one of the counsel for Gusik over here to inform the Court on the question of the errors of the record, as part of our case. Mr. Sklenicka at this time —

THE COURT: Well, is not the record in evidence?

MR. MORGENSTERN: The record has been placed, I believe, by the Government, in evidence and at this time —

THE COURT: The Court understood the record to be in evidence.

MR. MORGENSTERN: At this time we should like to cite the errors of the record, because of the fact that it is in evidence and we have had no opportunity as yet to cite all of the errors.

THE COURT: Well, would that not be a proper matter for argument?

MR. MORGENSTERN: Well, the matter of pointing out the errors of law and the errors of constitutional deprivations and the errors indicating that this verdict was void ab initio—I believe it would be proper to bring it to the attention of the Court at this time.

THE COURT: Well, why not bring it to the attention of the Court by brief instead of oral argument?

MR. MORGENSTERN: We have briefed the matter, I believe, Your Honor.

THE COURT: Well, is there any necessity of repeating it?

MR. MORGENSTERN: No, I don't believe, Your Honor, there is any necessity, because it is pretty well

covered in the brief on every phase of the record, the errors in the record and the indication that the court martial verdict was void ab initio.

MR. SKLENICKA: If I may address the Court just a moment, please. My purpose in presenting the record, transcript, in this case will be to show wherein the deprivations and invasions of the constitutional right under the Fifth Amendment affects the rights of this defendant under the habeas corpus proceedings which are before this Court at this time. Now, it may be —

THE COURT: Well, is not that a matter for argument?

MR. SKLENICKA: I was just going to say that it may be. While I will refer to the record and the general procedure of the trial to show the omissions and the errors in the proceedings—not to the weight of the testimony but to prove that there was an invasion of his constitutional right—in that it will be necessary, of course, to refer to the record, the manner in which the trial was conducted, the testimony of the witnesses and the general procedure and then distinguish between the weight of the evidence and the point of law that is involved in the case. In that process, of course, it will be necessary to present some of it in the form of argument. Now, if the Court so desires — —

THE COURT: Would it not all be argument? Counsel for the Government might not agree with anything you say.

MR. SKLENICKA: Well, I think it is necessary for —

THE COURT: You are not testifying.

MR. SKLENICKA: No, I am not testifying.

THE COURT: How is it proper at this time for you to make a recital to this Court of what is in the record? It may be so when it comes time to argue the case.

MR. SKLENICKA: Well, if the Court wishes that it be presented in argument, we will present it in the form of argument.

THE COURT: I think it would be improper to inject an argument into the record at this particular time. However, the Court will hear you at the proper time.

MR. SKLENICKA: We will reserve it to the proper moment.

THE COURT: Do you have any further testimony?

MR. MORGENSTERN: Yes. I want to call for further examination Gusik, the petitioner.

Thomas A. Gusik,

resuming the stand, testified as follows:

REDIRECT EXAMINATION (Continued)
By Mr. Morgenstern.

Q Showing you a photostatic copy of the alleged confession, I will ask you if you recall —

MR. VOORHIS: If Your Honor please, no claim has ever been made that that is a confession. If it is material, I will state and argue it is not a confession, and you would not consider it so if it were introduced in evidence in your Court.

MR. DIRENFELD: If the Court please, the Army Board of Review, Judge Advocate General's Review, refers to it as a confession.

THE COURT: Is it a part of the record in this case?

MR. DIRENFELD: Yes, sir.

MR. VOORHIS: I merely object to the characterization of it as a confession. It is not a confession.

MR. MORGENSTERN: Well, we have the Army Board of Review statement over here referring to it as a confession.

MR. WINDOM: Let the Court read it and determine it.

THE COURT: Well, the Court will determine that question. You may proceed with your examination.

Q I will ask you whether or not this is your signature on this alleged confession? This is your signature?

A Yes, sir.

Q That signature was taken about what date? Do you recall from the record here?

A The 15th of September, 1947.

Q Now, this was on what day of the time you were taken, or what numerical day? Was that the first day, or the second day or the fifth day?

A It was the fifth day, the last day I was down there.

Q Now, just prior to the signing of this alleged confession —

MR. VOORHIS: Your Honor please, it is not a confession and it is not an alleged confession. It may be a statement. I suspect it is. But it is not a confession.

MR. MORGENSTERN: I believe the question of the interpretation should be a matter for the Court to determine.

MR. VOORHIS: I heartily agree, and, therefore, I object to your characterizing it as a confession.

THE COURT: Well, the Court will take judicial notice of the fact that counsel is doing a little testifying, but I don't think it will prejudice the Court.

Q Was it after this alleged confession was taken from you that you were charged and court martialed for first degree murder?

A Yes, sir.

Q And prior to the time of this alleged confession you were not charged and court martialed for first degree murder, were you?

A No, sir.

Q Now, prior to the time of signing this alleged confession what had been the procedure at the C. I. D. Barracks? What did they do?

A To make me sign the statement?

Q Before they made you sign the statement.

A Well, they put me down in a chair with three other men, three or four other men, in the room.

Q Yes.

A And they started to twist my arm and they said I am going to sign —

MR. VOORHIS: Your Honor please, I thought this was fully covered on direct.

THE COURT: Yes.

MR. VOORHIS: If it is of any materiality or any assistance to have it repeated —

THE COURT: Is not this repetition of your direct examination?

Q All right, I will ask you now whether or not it is true as contained in this alleged confession, or even alleged statement, as to how you knew or got to know one Franco?

A No, sir.

Q Is the statement in this alleged confession true? Or will you describe the truth of it?

MR. VOORHIS: Your Honor please, the next to the last question—you may read the statement. It is in evidence. I don't see why he can testify what is in it and what isn't. The statement will speak for itself. This last question that has just been asked was asked him several months ago and he answered it fully on direct examination.

MR. PRICE: Our claim is, Your Honor, the statement was obtained under duress. We are trying to find out now which of the statements in this so-called confession are true and which are not true. I think the witness should be permitted to testify.

MR. VOORHIS: Your Honor please, he had the opportunity and he was questioned along that line in his direct testimony back in June.

THE COURT: He may answer.

Q I will ask you whether or not you made this following statement:

"I arrived in the Port of Leghorn on 26 December 1946. I was then sent to the 149th Replacement Depot, later on on the 28th of December 1946 I was transferred to the 88th Division to the 913th Field Artillery. I then left the 88th Division on March 7th 1947. I was then stationed on Depot 2L76, with the 913th F. A., later I

became the 7156 Engineer Guard Company. While I was with the 7156th, I came to know a certain Franco. I got to know him sometime in May 1947; the way I got to know this Franco was on May 1947, when he first approached me, and asked me if I wanted to sell any gas or tires."

A No, sir, it isn't.

Q What is the fact as to how you met Franco?

MR. VOORHIS: Your Honor please, we object.

THE COURT: He may answer.

MR. WINDOM: We have another objection then. May we request Mr. Morgenstern to start reading this statement at the first, if he intends to go through and take it sentence by sentence?

MR. MORGENSTERN: I would prefer to show the irregularities and incompetency of the statement as we go along, because this is not the statement —

MR. WINDOM: You started at the second paragraph. I would prefer that you start with the first one.

MR. MORGENSTERN: We will come to the first paragraph, sir. I shall be very happy to.

Q Will you explain and describe what you told them the truth was as to how you met Franco?

A Well, in May I was —

Q Talk a little louder so we can hear you.

A In may of '47 I was stationed on Post 12. That was on the east part of the depot, I believe. And we had an Italian labor camp over there and Franco was working in the depot and I met Franco over there, when he was coming in and out of the Italian labor camp. That's how I met Franco—not the way the statement says.

Q And did you describe to those who had taken this alleged confession from you how you met Franco?

A Yes, sir, I did.

Q And when they inserted here in their verbiage how you met Franco did you object to that?

A Yes, sir, I did.

Q What did you tell them?

A I told them it wasn't altogether how they had it down in the statement. The way I met Franco was in the Italian labor camp where he worked in the depot.

Q Who did you tell that to?

A The C. I. D. agent.

Q Which one was it, if you recall?

A Lt. Urdinarrain.

Q Now, when you told him that, and you told him that they hadn't got it correctly as you informed them, what did they then say to you?

MR. VOORHIS: Not "they".

Q What did Lt. Urdinarrain say to you?

A Well, he says on the night I was on guard over there I talked with Franco. And I say, "Yes". And he says, "Well, you met him that night when you were on guard". I said, "Well, I bumped into him accidental like when he was coming in and out of the labor camp".

They said, "Well, when you were on guard in the wee hours of the darkness you had a deal with them". I objected there and they left it in the statement as it was.

Q And against your wishes they left it in there; is that correct?

A Yes, sir.

Q Now, this statement here:

"Then, in the month of June 1947, I made my first deal, with Franco, I told Franco what post I was going to be on, and at what time to come in".

Did you tell that to the agents or to the representatives of the Army who took this alleged confession?

A No, sir, I didn't.

Q What did you say to them, if you recall?

A I don't recall what I said to them.

Q All right.

A I know I didn't say that.

Q But you definitely did not say that to them?

A That is correct.

Q Did you ever make a deal with Franco?

A No, sir, I didn't.

Q Did you ever make a deal in black marketeering with any person?

A No, sir.

Q How much money did you have in the bank after you were taken in and charged?

MR. VOORHIS: Your Honor please, I object.

THE COURT: Sustained.

MR. MORGENSTERN: Exception.

THE COURT: You may have your exception. Who is Franco? Is he allegedly the leader of the gang of thieves?

MR. MORGENSTERN: That is correct, Your Honor.

MR. PRICE: We expect to show by the question that Gusik only had three and a half dollars in his bank account and that at no time did he have any money in his bank account or in his possession which was not pay from the United States Government as a G. I. soldier.

THE COURT: Franco was one of the men that was killed?

MR. MORGENSTERN: No. He wasn't killed.

Q Did you state to the officer taking this alleged confession that Franco asked you if you wanted to sell any tires or gas any time in May of 1947?

A No.

Q Did you sell any tires or gas to Franco or to any other person at the time you were doing guard duty in the American Army at Leghorn or Tirrenia, Italy?

A No.

Q Now, then, it says:

"Then, in the month of June 1947, I made my first deal, with Franco, I told Franco what post I was going to be on, and at what time to come in."

Did you tell him, or did you make a deal, as to when you would be on and when he was to come in?

A No, I didn't.

Q Is that statement true in this alleged confession?

A No, it is not.

Q Is it your statement or your words that you had given to Lt. Urdinarrain to put in there, or is that his own verbiage?

A That was his own.

Q "I let Franco and two Italians named Di Pinto Luigi, and Marcello get into the depot."

Is that statement correct?

A No.

Q "On this deal, the three Italians did not steal anything, due that they had not brought any tools with them, because they intended to take tires out. After this, Franco would approach me, but I did not make any deal with him, because I did not know what post I would be on. Then on the 11th of August, 1947, I knew what post I would be on. I then got a pass and went out to look for Franco, to tell him to bring his gang, so that the deal could be pulled."

Did you tell that to Lt. Urdinarrain or to any other person who was taking this alleged statement or alleged confession?

A No.

Q Was this your language or your verbiage in any sense at all?

A No, it wasn't.

Q "Instead I met Moro who I knew was one of Franco's men, I told Moro to tell Franco that I would be on Post No. 4, from 0300 hours to 0500 hours, 13th August 1947."

Did you meet Moro and did you tell that to Moro?

A No, I didn't.

Q Was this put in at your instance or suggestion, or at the instance and suggestion of the one who was taking your statement, Lt. Urdinarrian?

A By the one that was taking my statement.

Q Was that Lt. Urdinarrain?

A Yes, sir.

Q Was that his verbiage and his words?

A Yes, sir.

Q "Moro then told me that he would see Franco and tell him. I also told Moro to tell Franco to whistle the tune of Angelina; The tune Angelina was used in both deals, I was involved."

A No, I wasn't.

Q Was this your verbiage or the verbiage of the one who took this alleged confession from you?

A By the one who took the confession.

Q And who was that?

A Lt. Urdinarrain.

Q And in the presence of who was this taken?

A There was another C. I. D. Agent over there. I don't know his name though.

Q "I was shown a statement given by William E. Hoagland, by Agent Urdinarrain, dated 4 September 1947, on one page and sworn to, on the 12th day of August 1947, and confirmed the same on every detail, except the part where I said I'll get Franco."

Was that a statement that you made, or was that an interpretation of a statement given by Lt. Urdinarrain?

A That was given by Lt. Urdinarrain.

Q This was not your statement?

A It was not.

Q And it is not correct?

A It is not correct.

Q "I have identified the photograph shown to me by Agent Urdinarrain, as one of the two men I had spoken to as was mentioned in Hoagland statement. One of these two men, I later shot on 13th August 1947."

Was this your statement which stated that you later shot one of these two men in August of 1947?

A No, it wasn't.

Q Whose statement was that?

A Lt. Urdinarrain.

Q Did you shoot anybody on August 13, 1947?

A No, I didn't.

THE COURT: Well, now, is this Court trying this case de novo?

MR. MORGENSTERN: Your Honor, we are attempting to go through here to show that this is not the statement —

THE COURT: You are certainly going far afield. Is it the province of this Court to hear all this testimony which was heard by the court martial?

MR. MORGENSTERN: Your Honor, they are submitting as part of the record a certain statement.

THE COURT: Well, the record is here.

MR. MORGENSTERN: Now, how are we to indicate or to show that this was not —

THE COURT: Are you attempting to refute the testimony in this record?

MR. MORGENSTERN: We are attempting to show that this statement was taken not only under duress and coercion, but it is a statement which he was forced to sign in violation of his constitutional rights which is not his statement, your Honor.

THE COURT: Well, the Court has no desire to unduly limit you, but it appears to the Court that you are taking in a rather broad field at this particular time. Do you have further questions?

Q I will ask you, Tom, just how it came about that this statement was worded in the manner in which it was presented to you for signature?

A Well, Lt. Urdinarrain — the statement I told him, he sort of changed it around; after he got done changing it around, that's what he had left out of it.

Q I see. Now, was this statement different than the two previous statements you had given?

A Yes.

Q Did you tell him, or ask him where the two previous statements were?

A No, I didn't. I told him I already signed two statements.

Q What did he say?

A Or signed one statement.

Q What did he say?

A And had another one written. He said, "Well, they lost them. They can't find them. I will have to give them another one."

MR. MORGENSTERN: That is all at this time.

RECROSS EXAMINATION
By Mr. Voorhis.

Q This statement that you have been discussing with your counsel you did sign?

A I did sign it.

Q This is a photostat of your signature appearing on pencil page number 84 of Respondent's Exhibit A, I believe it is?

A Yes, sir, it is.

Q What signature is that just below yours on the same page?

A John S. Strano, 2nd Lieutenant.

Q Did you swear that this was a true statement before him?

A No, I didn't.

Q Did you see him sign that?

A No, I didn't.

Q Whose signature is this on the bottom of the same page?

A Urdinarrain.

Q Did you see him sign that?

A No, I didn't.

MR. VOORHIS: No further questions.

(Witness excused.)

MR. MORGENSTERN: May it please Your Honor, counsel for Thomas A. Gusik, Petitioner, rests at this time.

(And Thereupon The Petitioner Rested.)

MR. WINDOM: If the Court please, the Government moves to dismiss the proceedings at this time. If I understand the Petitioner's position correctly — at least the bulk of his argument and questioning has been devoted to the statement which was just under question before the Court that appears as the last document in the certified transcript of the proceedings of the court martial.

If Your Honor will read that you will find, first that it is not a confession; and, secondly, he does not admit murdering anyone in there. Therefore, the truth, falsity, or the means by which that statement was taken could not have affected his conviction by the court martial. That is, I am assuming for the purpose of argument only that all of the things he said are true. Nevertheless, there is nothing in that statement which would have justified a conviction on a charge of murder.

Therefore, the entire charge or allegation of the Petitioner with relation to that statement must fall. The Petitioner has not sustained the burden of showing that the court marital was without jurisdiction; or, secondly, that it did not have jurisdiction to impose the sentence imposed.

THE COURT: The Court will examine this record before ruling on your motion. Therefore, ruling will be reserved at this time. You may call your first witness.

MR. VOORHIS: I will call Colonel Wolfe.

THE COURT: At this time the Court will take a recess for ten minutes.

(Recess taken.)

MR. VOORHIS: There is a loose sheet in this record which ought to be attached. We will insert it in its proper place by agreement.

THE COURT: Without objection it will be so ordered.

MR. VOORHIS: May I introduce some documentary evidence? As Exhibit-B for the Respondent I offer

in evidence an authenticated copy of War Department General Orders Number 39 dated the 10th of April, 1947.

THE COURT: Has it been marked for identification?

MR. VOORHIS: Not as yet.

THE COURT: Perhaps it would be better to have the reporter mark it for identification purposes.

(Thereupon, paper writings were marked Respondent's Exhibits B, C, D and E for purposes of identification.)

MR. VOORHIS: Respondent's Exhibit B is an authenticated copy of War Department General Orders Number 39 dated April 10, 1947, with particular reference to paragraph 1.

THE COURT: Is there objection?

MR. VOORHIS: Paragraph I under Article of War 8 by direction of the President authorizes the Commanding Officer of the Port of Leghorn to appoint general court martials.

MR. MORGENSTERN: No objection, your Honor.

THE COURT: It will be admitted.

And thereupon War Department General Orders Number 39 was offered and admitted in evidence and is herewith submitted marked **Respondent's Exhibit B,** and made a part thereof,

MR. VOORHIS: Respondent's Exhibit C is an authenticated extract copy of the Port of Leghorn Special Orders Number 38 dated the 3rd of September, 1947, Paragraph 1, which appoints a general court martial. The purpose of this exhibit is that the first endorsement of the charge sheet appearing on pencil page 33 of Respondent's Exhibit A refers the charges against the Petitioner here to that court.

THE COURT: Is there objection?

MR. MORGENSTERN: There is only one statement we should like to make with reference to Exhibit C, and that is that the counsel's name requested by Gusik does not appear there, which is Lt. Ryan. Otherwise there is no objection.

MR. VOORHIS: However, Lt. Clarence W. Burks is named as defense counsel.

THE COURT: Well, it speaks for itself. Whoever is named will appear. It will be admitted in evidence.

MR. VOORHIS: Respondent's Exhibit D is an authenticated copy of a brief in support of Private Thomas A. Gusik in hearing before a Court Martial Review Board, Washington, D. C., Monday, December 15, 1947. In addition to being authenticated, it purports to be an original.

MR. MORGENSTERN: We should not object to this, with the understanding that at the time that this brief was submitted that the information obtained from our client, Thomas Gusik, was obtained in the presence of an Army official and he was not able to give his entire story as he did when we were able to interview him without the presence of an Army officer.

THE COURT: It will be admitted.

MR. VOORHIS: I will agree to no such stipulation on its admission, sir. The evidence is before you. I offer this for what it is worth.

MR. MORGENSTERN: We will have to object under the circumstances, your Honor.

THE COURT: Well, state your objection.

MR. MORGENSTERN: I am objecting for this reason, Your Honor: That at the time that we appeared before the Army Appeal Board there was an interview by counsel for the defense at Green Haven, New York. That interview was had in the presence of any Army official. The boy could not and did not tell his complete story because of the presence of that Army official. At a later date when he was brought to Chillicothe, Ohio, a

committee interviewed him and we learned facts at that time which we were unable to get at the time that we prepared this brief before the Army Appeal Board, Your Honor.

THE COURT: For what purpose are you offering this brief?

MR. VOORHIS: I am offering it for the purpose, Your Honor, of argument that some of the matters now urged before you are of recent manufacture.

MR. MORGENSTERN: Object to that, if the Court please. I think it is a statement that is not proper.

THE COURT: It will be admitted.

And thereupon the brief was offered and admitted in evidence and is herewith submitted marked **Respondent's Exhibit D**, and made a part hereof.

MR. DIRENFELD: If it please the Court, in reference to Exhibit C we wish to enter an objection, in that this excerpt or extract which is offered now contradicts the record which is in evidence here and the record of the trial. This extract purports to be an order of September 3, 1947. The original which is part of the file shows it to be Special Order 50 appointing the court martial board of October 6, 1947. We, therefore, emphatically reject any other order which contradicts the record here.

THE COURT: Well, are you objecting to the authenticity of the document or to its relevance?

MR. DIRENFELD: We object to the authenticity of the document, because the original is already in the file and we will not consent to the admission of another that tends to contradict it.

MR. VOORHIS: If my brother will bring the exhibits up I believe I can explain there is no contradiction of the record, no impeachment of the record, but a proper supplementing of the record in these two orders.

THE COURT: For what purpose was this document offered?

MR. VOORHIS: The first endorsement to the charge sheet refers the charges for trial to the Trial Judge Advocate of the General Court Martial appointed by paragraph 1 of Special Orders Number 38 of the Port of Leghorn, dated 3rd September 1947. That order I have just offered in evidence as Respondent's Exhibit C. That is the order referred to in the first endorsement to the charge sheet.

We go to the convening of the court martial—

THE COURT: Well, now, if this order is duly authenticated, is official, and has any bearing on this case it will be considered. If not, it will be excluded.

MR. DIRENFELD: Your Honor, the thing that I wanted to point out—

MR. VOORHIS: One more sentence will, I think, show its relevancy. The court which heard the case was appointed by paragraph 6 of Special Orders Number 50 dated the 6th of October, 1947, as my brohter says. The concluding subparagraph reads as follows:

> "All unarraigned cases in the hands of the Trial Judge Advocate of the General Court Martial appointed by paragraph 1, Special Orders Number 38, this Headquarters, dated 3rd September, 1947, may be brought to trial before this court."

MR. DIRENFELD: We say that this is only contradiction to the extent that the order is already an order which is part of this record and file which has gone before the court martial board. This is the record that was before the court martial board, the same record that was before the Board of Review, and it is the same record that was before the Secretary of War. At this late date in this Court the Respondent attempts to enter in an exhibit which contradicts their record.

MR. VOORHIS: It does not contradict.

THE COURT: Well, now, Just a moment. The Court has not had the opportunity to examine the record or the exhibits. The Court will reserve ruling upon its admissibility at this time until it has had the opportunity of examining or checking the record.

MR. VOORHIS: For the record, the order which I last read appears on penciled page number 38 of Respondent's Exhibit A. The first endorsement to the charge sheet appears on penciled page number 33 of Respondent's Exhibit A. Throughout I am using the penciled numbering of Exhibit A in the lower right-hand corner.

THE COURT: Very well. Does that constitute all of your documentary evidence at this time?

MR. VOORHIS: Well, I will offer Respondent's Exhibit E. Respondent's Exhibit E consists of two documents, one of about four pages in length and the other of two. The first is a personnel placement questionnaire executed by Lt. Burks. The second is what the Army calls a 66-1 card, which is an officer's qualifiaction card, which contains pertinent information about the officer to which it applies.

THE COURT: Is there objection?

MR. DIRENFELD: Yes, there is an objection, Your Honor please. Tendered Exhibit E is a qualification card of defense counsel. It is no part of the record whatsoever, either from the beginning of the trial until the very end up to this date. It is in effect an attempt to place before you here something that is entirely irrelevant to the case.

THE COURT. Well, is it irrelevant, in view of your contention that this man was not properly represented?

MR. DIRENFELD: It is to this extent, Your Honor, that were Lt. Burks brought before this Court he could testify to everything that is on this paper, and we definitely reject—

THE COURT: Well, are you questioning the authenticity of the paper?

MR. DIRENFELD: No.

THE COURT: As being the correct personnel record of Lt. Burks?

MR. DIRENFELD: No. We don't question the authenticity.

THE COURT: The Court will make the same ruling as to this exhibit.

MR. DIRENFELD: But we say it is irrelevant.

THE COURT: The Court will reserve ruling on its admissibility at this time until it has had an opportunity to examine the exhibit.

Does that constitute all of your exhibits?

MR. VOORHIS: At the moment, yes, sir. May I call Colonel Wolfe as a witness?

C. O. Wolfe,

called on behalf of the Respondent, being first duly sworn, testified as follows:

Examined by Mr. Voorhis.

Q. What is your full name, Colonel?

A C. O. Wolfe.

Q You are presently an officer in the United States Army?

A I am.

Q In 1945 and 1946 what was your occupation?

A I was Staff Judge Advocate of the Peninsula Base Section, Headquarters Leghorn, Italy.

Q Was that headquarters later redesignated?

A The headquarters was deactivated and it was succeeded for court martial jurisdiction purposes by what is known as the Port of Leghorn.

Q Who commanded the Peninsula Base Section—did you call it?

A Yes.

Q —during your tour as Staff Judge Advocate of that headquarters?

A The majority part of the time it was commanded by General Francis Ox.

Q Who later commanded the Port of Leghorn?

A General Blood.

Q Was he at any time in command of the Peninsula Base Section?

A He was for about a year.

Q Now, briefly, what were your duties as Staff Judge Advocate of an Army Command?

A As Staff Judge Advocate the duties were such as were defined by the Articles of War, including Article of War 70. In particular it had to do with the advice to the Commanding General on the appointments of general courts martial personnel to be on the court, the review of charges preferred, the review of records of trial and the advice to the Commanding General with reference to final action to be taken in a case that had been tried by a general court martial.

Q At sometime was 1st Lt. Clarence W. Burks assigned to your staff section for duty?

A He was on detached service with my office, that is, as an Assistant Judge Advocate of that Command.

Q And what was his primary duty?

A During the time he was connected with my office, that is, the office of the Staff Judge Advocate, he acted first as defense counsel on general courts martial, subsequently as Trial Judge Advocate, and finally as defense counsel.

Q When did you cease holding the position of Staff Judge Advocate of Peninsula Base Section, or the Port of Leghorn?

A In April 1947.

Q How long had Lt. Burks acted as defense counsel prior to that time while you were in that position?

MR. MORGENSTERN: May it please Your Honor, the question isn't as to his ability or inability at the time of defending Gusik. The question is—

THE COURT: If the Court understands you correctly, you are contending no matter what his qualifications may have been, that he didn't give proper representation to this man at the time of his trial?

MR. MORGENSTERN: That is correct, Your Honor.

THE COURT: Well, are you raising any question as to whether or not he was qualified to defend, had he defended?

MR. MORGENSTERN: No, there is no question.

MR. VOORHIS: Well, if they will stipulate some facts and figures here we will dispense with this witness.

MR. MORGENSTERN: We will say this, that our claim is that during the course as defense counsel for Gusik he not only was not qualified at the time, but he did not defend him in accordance with his oath, and he did not defend him properly and legally in accordance with the Articles of War.

THE COURT: Well, that wouldn't go to the question of his qualifications, would it? That is, he may have been a lawyer and a good lawyer, but you are contending that he didn't properly represent him at that particular time?

MR. MORGENSTERN: That is right, Your Honor.

THE COURT: Why go into all these qualifications?

MR. VOORHIS: One of his contentions is that he was not qualified.

THE COURT: But you are conceding that he was qualified, had he defended him; is that true?

MR. MORGENSTERN: We don't know.

MR. PICKLOW: We don't know whether he was qualified or not.

MR. MORGENSTERN: We say this Your Honor, that regardless of what his previous qualifications may have been, at the time he defended Gusik he did not defend him properly legally and in accordance with the Articles of War, and that he was not a defense counsel in the term of what defense counsel is and should do. He did not conscientiously —

MR. VOORHIS: Your Honor please, the allegations in the petition, paragraph 7, are that the Defendant, Thomas A. Gusik, was denied counsel of his own choos-

ing and was thereafter represented by counsel not of his own choosing. Omit a phrase. "Defendant's counsel was unprepared and incompetent."

THE COURT: Well, now, "incompetent" is a rather broad term.

MR. VOORHIS: It certainly is, and I think it goes to his capabilities.

THE COURT: Objection overruled. He may answer.

MR. MORGENSTERN: Exception.

THE COURT: You may have your exception. Read the question to the witness.

THE REPORTER: (Reading) "Question: How long had Lt. Burks acted as defense counsel prior to the time while you were in that position?

THE COURT: You may answer if you know, Colonel.

A I may answer it this way: Lt. Burks was first appointed as defense counsel on the General Courts Martial for the Peninsula Base Section in about March 1946. He continued to hold that position as defense counsel for approximately eight months continuously thereafter.

Q Then what were his duties?

A Then he was made Trial Judge Advocate for the General Courts Martial appointed by the Peninsula Base Section.

Q How long did he continue that as his primary duty while you remained?

A Approximately until the time I left Leghorn in July of 1947.

Q Would that be another eight or ten months?

A Approximately eight more months.

Q And during that period of time, either as defense counsel or as trial judge advocate, in how many general court martial trials did he act?

A I would estimate he acted as counsel in a minimum of at least 300 general court martial trials.

Q During that period of time did you have occasion to hear what members of courts considered to be his competency or incompetency as counsel?

MR. MORGENSTERN: Object.

THE COURT: Sustained.

Q At the time he was first placed on a general court martial in the command in which you were Staff Judge Advocate, did you have any personnel records pertaining to Lt. Burks?

A I had none. I was shown his Form 66-1, that is W. E. A. G. on Form 66-1.

Q I show you the second document included in Respondent's Exhibit E and ask you if that's a photostatic copy of the 66-1 that you were shown?

MR. DIRENFELD: Your Honor please, that is the exhibit which was tendered and objected to and the Court has withheld thereon, and we, therefore, renew our objection at this time as to the testimony from the exhibit which is the Form 66-1.

THE COURT: The exhibit has not been admitted in evidence. However, he may interrogate him about this particular part of it. Objection overruled.

A That appears to be a copy of the original form which was sent to my office prior to his assignment to our Section.

Q In considering whether to recommend to your General that Lt. Burks be appointed as counsel for general court martial did you consider his legal education?

A I did.

Q And what was the legal education of Lt. Burks that you considered?

A The information as shown on his Form 66-1—

MR. MORGENSTERN: May I object at this time, if the Court please?

THE COURT: Yes. The form is now in evidence.

MR. MORGENSTERN: The statement made is information he received. It is not of his own personal knowledge, Your Honor, and I don't believe he can tes-

tify from his personal knowledge as to what his qualifications were.

THE COURT: Are you attempting to fortify this document?

MR. VOORHIS: If Your Honor please, the appointment of a counsel by a judge or by an appointing authority in the Army justice system, if it is attackable, is attackable on the basis that the judge or the appointing authority abused his discretion.

THE COURT: Well, he has already answered that he appointed him in view of the information contained on this particular form. Now, if he had any other information he may answer as to it. He has already answered your question, Colonel. What else did you have in mind?

MR. VOORHIS: What legal education Lt. Burks had, according to official Army records before the appointing authority at the time he was appointed?

THE COURT: Well, the official records are the best evidence.

MR. VOORHIS: You haven't admitted them, your Honor. I think they are the best evidence of whether or not the appointing authority acted in good faith and based his discretion.

THE COURT: The Court will take that into consideration. Unless there is more objection than indicated, the records will be admitted and considered by the Court, if they are authentic records.

MR. VOORHIS: I would like to read one entry from these records.

THE COURT: Why is it pertinent at this particular time? The Court will examine the exhibits?

MR. VOORHIS: Because at this time, sir, I hope we are considering the qualifications of the defense counsel.

THE COURT: That is true, and if this witness knows anything about the qualifications he may answer

and give the source of his information, and the Court thinks he has already answered that.

MR. VOORHIS: He hasn't answered the last question.

Q What legal education of Lt. Burks did you consider at the time you decided to recommend him to your General for appointment as defense counsel?

THE COURT: If he knows what his legal qualifications were, he may answer. If he doesn't know, the objection will be sustained.

A Will you repeat the question you want me to answer again, please?

Q What legal education of Lt. Burks did you consider at the time you recommended his appointment for general court martial as defense counsel to your Commanding General?

A I considered his education, his educational qualifications, as shown on his official Army records and as related to me personally by Lt. Burks.

Q Now, will you state what his legal education and qualifications were that you did consider that you obtained from official records and from his statements to you?

A The fact, first, that he was a practicing lawyer, having graduated from a reputable law school; and I believe that, second, personal interrogation as to his experience in the trial of cases.

Q Now, can you refresh your recollection as to what law school or schools he was a graduate of by referring to Exhibit E?

A I believe I know that.

Q Well, will you tell us?

A Harvard Law School, Harvard University.

Q What degree did he obtain from Harvard?

A My recollection is it was a Master of Law Degree.

Q Do you know whether or not he had a Bachelor of Law Degree?

A I believe he did. I couldn't state whether it was from the same university or not, though.

Q Could you refresh your recollection by any records you have with you?

THE COURT: Do not these records show the Lieutenant's background, training and educational qualification?

MR. VOORHIS: They certainly do, sir.

THE COURT: Well, are you attempting to fortify the record by this witness?

MR. VOORHIS: I am trying to get this witness to testify as to what they are, in case for any reason these records don't get in.

THE COURT: Well, what was your objection to this particular record? It is an Army record.

MR. MORGENSTERN: We objected to the statement by the Colonel to the effect that he obtained his information from a record. In other words, it was not personal.

THE COURT: No. This particular exhibit — what is the title of the exhibit?

MR. VOORHIS: We call it a 66-1.

THE COURT: What is the identification?

MR. VOORHIS: Exhibit E.

THE COURT: What is your objection to E again?

MR. DIRENFELD: Our objection is that it is no part of the record, first; second, that Lt. Burks were he here in Court could testify to that, and bringing this record in is an attempt to have a man's qualities brought before the Court without bringing the man in so that he may be cross examined concerning those qualities.

THE COURT: Well, this Court no doubt will be dealing with Army records more or less in this case, and this is an official Army record, is it not?

MR. DIRENFELD: We could not dispute that, Your Honor.

THE COURT: It will be admitted in evidence.

MR. DIRENFELD: Objection.

And thereupon the records were offered and admitted in evidence and are herewith sub-

mitted marked **Respondent's Exhibit E,** and made a part hereof.

THE COURT: Now, do you have further questions?
MR. VOORHIS: I do not.
THE COURT: You may cross examine.

CROSS EXAMINATION
By Mr. Direnfeld.

Q Now, Colonel, you state that you knew Lt. Burks quite well?
A I did.
Q And do you know where Lt. Burks is today?
A I know by hearsay only.
Q Have you learned by investigation?
A Other than personal inquiry, no.
Q Let me ask you, Colonel, is Lt. Burks practicing law today?
A That I don't know.
Q Well, isn't it a fact that he is in business in Italy today?
A That I don't know.
Q Colonel, do you know whether Lt. Burks ever practiced law in civilian life?
A I do by his statement what he said he did.
Q Now, actually, doesn't his 66-1 show he was an adjuster, and not an attorney, for a coal company?
A That I would have to look at again. It shows he graduated from the law school, university.
Q Yes, but that does not state that he practiced law in the civilian courts, does it?
A I don't know. I would have to look at it again. Lt. Burks told me that he practiced law.
MR. DIRENFELD: I will have to object to the answer as hearsay and ask that it be stricken from the record.
MR. VOORHIS: We think it is a very appropriate answer to the question as asked, sir.

THE COURT: Let us proceed, gentlemen.

Q Now, you stated the considerations that you deliberated on before selecting a man, approving a man and recommending a man; is that correct.

A That's right.

Q Well, was civilian practice one of them?

A As a lawyer, yes. I thought that was very important.

Q And what is your opinion if the lawyer does not have any civilian experience?

A He would still be better than a person who had no law degree at all.

Q Now, that is not answering the question.

A Well, that's my opinion.

Q As compared to one who has trial experience —

A That's right.

Q — what is your opinion?

A I would pick an experienced man if I had one available.

Q I see. And is it your contention that a better man was not available and that is why Lt. Burks was chosen?

A I am not contending anything. I am just answering the question. Lt. Burks was the best one whose name was submitted to me as being available.

THE COURT: What is the difference whether or not there was a better man if this man qualified?

Q Now, you stated that he appeared in how many court martials?

A My estimate is at least 300.

Q About how many of those were as Trial Judge Advocate?

A I would say about, oh, half. He was approximately the judge as long as he was defense counsel.

Q You would say about half as defense counsel and half as Trial Judge Advocate?

A That's right.

Q Do you know how many times approximately as defense counsel he secured acquittals for defendants?

A I would say approximately I know, yes.

Q Do you have any record showing those?

A I do not have them with me.

Q Now, do you know Captain Joseph O'Leary?

A I do.

Q What were Captain O'Leary's qualifications? Excuse me. He was part of your staff, was he not?

A He came over to me shortly -- about six months, I would say, before I left Leghorn.

Q Now, tell the Court what Captain O'Leary's qualifications were?

THE COURT: Well, what have we got to do with Captain O'Leary? How does he get into this case?

MR. DIRENFELD: Captain O'Leary was assigned as assistant defense counsel, Your Honor.

THE COURT: Is that shown by the record?

MR. DIRENFELD: That is shown by the record.

THE COURT: He may answer if he knows.

THE WITNESS: What was the question, please?

MR. VOORHIS: Captain O'Leary was excused from attendance at this trial, but we are perfectly happy to have you hear what his qualifications were.

THE COURT: Well, did he participate in the trial?

MR. VOORHIS: No, sir.

THE COURT: Well, then, why is he in issue in this case?

MR. DIRENFELD: He was appointed by the special orders. That is what we want to find out, your Honor.

THE COURT: Well, counsel apparently is willing to stipulate that Captain O'Leary did not participate in this trial.

MR. VOORHIS: It appears as of record, sir. It is not a question of stipulation.

THE COURT: Well, if it is so admitted, why make it an issue? We have enough issues to try without making additional ones.

Q Now, you were chief of the J. A.; is that correct?

A Staff Judge Advocate.

Q Was it among your duties to assign defense counsel and Trial Judge Advocates?

A It was to make recommendations to the Commanding General.

Q And did you recommend the three officers who are listed in the record as Trial Judge Advocates: Captain Young, Captain Allen and Captain Klemm?

A I was not present Staff Judge Advocate when this case was tried. I had already come home.

Q Oh, you were not there during this time?

A No. I came home in July of 1947.

Q I see. Now, do you know who the Commanding Officer of the Port of Leghorn was in September or October of 1947?

A No, sir, I don't. I had already come home then. But they had a number of changes after I left and it was very fast, and I couldn't tell you.

Q Well, you gave us the names of General Francis Ox and General Blood and General somebody else, who were Commanding Officers of the Port of Leghorn; is that right?

A That's right.

Q Do you know whether Colonel Orsinger was Commanding Officer of the Port of Leghorn in September or October, 1947?

A I know that by hearsay. He was the Commanding Officer, but it was after I left there.

Q He won't ask for hearsay.

A That's right. I don't how of my own knowledge.

MR. DIRENFELD: That will be all.

(Witness excused.)

And also:

Robert Martin Urdinarrain,

called on behalf of the Respondent, being first duly sworn, testified as follows:

Examined by Mr. Voorhis.

Q What is your full name?

A Robert Martin Urdinarrain.

Q You are presently in the United States Army?

A Yes, sir.

Q Were you on duty in the United States Army in August and September of 1947?

A Yes, sir.

Q What was your grade at that time?

A Special Agent, Criminal Investigation Division, United States Army, Foreign Service.

Q And by assimilation or otherwise, what was your rank or grade?

A Staff Sergeant.

Q And today what is your rank or grade?

A Tech. Sergeant.

Q Where were you stationed in August and September of 1947?

A At Leghorn, Italy.

Q What were your duties at that time?

A Criminal Investigator for the United States Army.

Q Now, in connection with your duties as Criminal Investigator of the United States Army was there referred to you for investigation or action anything in connection with a depot at or near Tirrenia?

A Yes, sir.

Q When was that referred to you?

A I will have to look it up.

MR. MORGENSTERN: At this time we object to examination of the records unless a request is made and the record shows that he is referring now to records.

MR. VOORHIS: Withdraw the last question.

Q Have you brought some records, documents or papers with you?

A Yes, sir.

Q Do they pertain to an investigation conducted by you in August and September of 1947 with respect to an Army depot at or near Tirrenia?

A Yes, sir.

Q When was some matter with respect to the depot at Tirrenia referred to you for investigation?

A On the 13th of August 1947.

MR. DIRENFELD: Your Honor please, we wish to interject an objection at this time until the witness has shown whether or not he made those records and, if so, when.

Q Were the records you have with you made by you?

A Yes, sir.

Q When?

A In Leghorn, Italy.

Q When?

A The 15th of September.

Q What was the general nature of the matter referred to you for investigation at that time?

A I was ordered to investigate a homicide at Depot 2L76 in Tirrenia, Italy.

Q And anything else?

A Also a series of larcenies committed at that depot at Tirrenia.

Q And did you investigate a homicide committed at Tirrenia, Italy?

A Yes, sir.

Q And did you investigate a series of larcenies committed at the depot in Tirrenia, Italy?

A Yes, sir.

Q Who was in charge of those investigations?

A I was the Agent assigned to investigate both of those incidents.

Q Who else worked on them?

A Agent Whitmire.

Q Anyone else?

A No, sir.

Q What was Agent Whitmire's relationship to you in connection with these investigations?

A Agent Whitmire was helping me on the larcenies at Depot 2L76.

Q Was he operating independently or in conjunction with you or under your direction?

A He was working under my direction.

Q Did you at any time meet Thomas A. Gusik?

A Yes, sir.

Q Do you see Thomas A. Gusik here in Court today?

A Yes, sir.

Q Will you point to him?

A Sitting right there (indicating).

Q When did you first meet Thomas A. Gusik?

A It was about the 13th of August, the 13th or the 14th of August, when I first met Gusik.

Q And what were the circumstances under which you met him?

MR. MORGENSTERN: Does that refer to 1947?

THE WITNESS: 1947.

MR. VOORHIS: Let it show that our dates are all '47 unless we specify differently.

Q Under what circumstances did you meet Thomas A. Gusik on the 13th or 14th of August

A We had Gusik brought to the C. I. D. office in connection with two men that had been shot on his post, and that he had shot these two men at Depot 2L76.

Q How long a period of time after the purported shooting did Gusik come to your office?

A I don't recall the exact date.

Q No. I am just saying, was it right away, or was it the next day, or was it a month later?

A It was several days later.

Q Several days after it?

A After the incident.

Q Can you refresh your recollection as to the date of the so-called shooting?

A The shooting was on the 13th of August.

Q Then, when was the first time you saw Thomas A. Gusik?

A On or about the 15th or 16th of August.

Q What time of day did you see him?

A The first time I think that Gusik was brought in it was in the morning hours.

Q Well, what part of the morning would that be?

A I'll say about ten o'clock.

Q How long did you see him that day?

A Oh, I would say for about three hours.

Q Who was present besides you and Gusik?

A There was Agent Whitmire and several of the Italian police.

Q Who talked to Gusik on that occasion?

A I did.

Q Did anyone else?

A I believe Agent Whitmire was present.

Q Did he talk to Gusik?

A I don't recall whether he talked to Gusik or not.

Q Was Lt. Strano present?

A No, sir.

Q What did you talk about on that occasion about the 15th or 16th of August?

A We talked in regards to the two men that he had shot at Depot 2L76.

Q Did he make any statement to you?

A Yes, sir.

Q Was that statement reduced to writing?

A Yes, sir.

Q Did Gusik sign that statement?

MR. MORGENSTERN: Object, if the Court please, unless the time is designated, as to wether it is statement number 1, 2 or 3.

MR. VOORHIS: I am talking about the interview on the 15th or 16th of August.

MR. MORGENSTERN: The first statement you are talking about?

MR. VOORHIS: I am talking about the interview on the 15th or 16th of August.

THE COURT: Overruled. He may answer.

Q On that first interview on the 15th or 16th of August did Gusik make any statement to you with respect to this shooting?

A Yes, sir.

Q Was it reduced to writing?

A Yes, sir.

Q Did he sign it?

A Yes, sir.

Q Do you have a copy of that statement made to you on the 15th or 16th of August?

A Yes, sir.

Q May I see it?

THE COURT: Is that statement a part of the record?

MR. VOORHIS: I don't know until I see it. The statement that is a part of the record is dated the 15th of September; isn't that correct?

MR. MORGENSTERN: What is that, sir?

MR. VOORHIS: The statement that is a part of the record is dated the 15th of September?

MR. MORGENSTERN: The 15th of September, that's right.

THE WITNESS: The 15th of September.

Q Well, we are talking about an interview on the 15th or 16th of August, the first time you saw Gusik. Now, the first time you saw Gusik, two or three days after the shooting, did he make a statement to you?

A No, sir.

Q Then were you in error in your answers to me —

MR. MORGENSTERN: Object, if the Court please, The record will speak as to whether he is in error or not. It corroborates the statement of Gusik.

THE COURT: Are you trying to fortify your own witness?

MR. VOORHIS: No, I am not, sir. I am asking him if he gave me answers that were in error.

THE COURT: If he wants to explain any statements he has made, he may do so.

Q Why did you tell me a few minutes ago that Gusik had made and signed a written statement on the 15th of August?

A I was under the impression you were referring to the one statement I took from Gusik dated the 15th of September, 1947.

MR. MORGENSTERN: At this time, if the Court please, I object.

THE COURT: Overruled.

MR. MORGENSTERN: Exception, your Honor.

THE COURT: You may have an exception.

Q Well, now, your first interview with Gusik was on the 15th or 16th of August, two or three days after the shooting; is that correct?

A Yes, sir.

Q How long did you see him that day?

A Three hours.

Q That was in the morning hours?

A That was in the morning hours.

Q When did you finish your visit or talk with him? Approximately what time in the morning did that three hours expire?

A Oh, I would say it was around about noon — twelve or one o'clock.

Q Then where did Gusik go or what did he do after that?

A He was taken back to D. T. C.

Q What did you talk about that morning?

A We talked regarding the two civilians having been shot over at Depot 2L76.

Q Did you see Gusik on any other occasion?

A Yes, sir.

Q When did you see him again?

A I saw him several days later.

Q Where?

A I went down myself to pick him up at D. T. C. and bring him over to our office.

Q What time of day was that?

A That was in the morning around ten, ten-thirty.

MR. MORGENSTERN: May I inquire as to several days later, just approximately what date he refers to?

THE WITNESS: I don't recall the date, the exact date, how many days later.

MR. VOORHIS: He said several days later.

MR. MORGENSTERN: Then this first visit? Oh, on the 15th or 16th of August?

MR. VOORHIS: That is my understanding.

MR. MORGENSTERN: I wanted to get that sure, Colonel.

Q What did you talk about that day?

A Regarding the two civilians shot at Depot 2L76.

Q Was anyone else present?

A Agent Whitmire and several of the Italian police.

Q Italian police — did they participate in the questions or answers?

A No, sir.

Q What time did that interview end?

A About twelve o'clock, twelve-thirty.

Q Then what happened to Gusik?

A He went back to the D. T. C.

Q Did you see him on any other occasion?

A Yes, sir.

Q Approximately when?

A That was sometime in September, though.

Q Where did you see him in September?

A At the C. I. D. office.

Q How did he get there?

A I went down to pick him up myself.

Q About what time of day did you get to the C. I. D. office?

A I think I must have got back about eleven o'clock. I picked him up in the morning.

Q How long did he stay in the C. I. D. office on that occasion?

A About five-thiry or six o'clock.

Q And what did you discuss on that occasion?

A That's where he gave me a statement. That was the 15th of September.

Q He made a statement on that day?
A He made a statement.
Q About what time of day was that statement signed?
A It was signed at 1600 hours.
Q Which is what, what time of day?
A Four o'clock.

MR. MORGENSTERN: May the record show that he read from the record indicating the time — that it is not from his own personal knowledge, but referring to a record?

THE COURT: Do you know of your own personal knowledge as to the time?

THE WITNESS: No, sir.

Q Did you prepare the record that you referred to a minute ago?
A Yes, sir.
Q And when did you prepare that record?
A On the 15th of September, 1947.
Q Did Gusik sign the statement that you said he gave you on that day?
A Yes, sir.
Q How many copies did he sign?
A Eight or nine copies.

THE COURT: At this time the Court intends to take a recess until two o'clock.

(And thereupon a recess was had until 2:00 P.M. of same day.)

Afternoon Session,
September 8, 1948.

And also:

Robert Martin Urdinarrain,

resuming the stand for further direct examination, testified as follows:

Examined by Mr. Voorhis.

Q Mr. Urdinarrain, will you tell us the circumstances under which you first met Mr. Gusik?

A When Gusik was brought over to C. I. D. office it was in connection with the homicide of two native civilians at Depot 2L76 and also a series of larcenies that had been committed at 2L76.

Q Now, this morning you told us that the first time you met him you went out to Disciplinary Training Center. Were you correct in that statement?

A No. I made a mistake in that statement when I stated it like that.

Q Well, how did you happen to see him the first time?

A Gusik was brought in from — by the Securities Sergeant over at Depot 2L76.

Q What was that Sergeant's name?

A I believe his name was Sergeant Tuck.

Q And approximately when was that?

A That was on — the first time he was brought in was on the 3rd of September. I have the exact date.

Q Well, was it on the 3rd of September, or was it very shortly after the death of the two Italians?

A It was after the death of the two Italians.

Q Shortly after the death?

A Shortly after the death of the two Italians.

Q Now, how long did he stay in your office on that day?

A Approximately three hours.

MR. MORGENSTERN: If the Court please, may we get an approximate date shortly after the death of the two Italians?

Q What was the date of death of the two Italians, or the date of the shooting that resulted in their death?

A 13 August 1947.

Q How shortly after the 13th of August did Sergeant Tuck bring Gusik into your office?

A About two days after.

Q So that is approximately the 15th of August?

A The 15th of August.

Q When did you see Gusik after the 15th of August?

A I saw him again several days later. I don't recall just how many days after he was brought back by Tuck again.

Q So Sergeant Tuck brought him into your office in Leghorn twice?

A Yes, sir.

Q Did he bring him in any other times?

A Yes, sir.

Q How many other times?

A He brought him once more.

Q Three times?

A Three times he brought him in.

Q Over how long a period of time were these three visit?

A Well, the longest I kept him in the office —

Q No. I don't mean each visit. But from the 13th of August until approximately what date did these three visits occur?

A I would say about until the 18th or 20th of August.

Q Well, after the 18th or 20th of August, the last time that Sergeant Tuck brought Gusik in, when did you see Gusik again?

A I saw him — it was in September I saw him after he was in D. T. C. already.

Q Then the next time you saw him he was in the Disciplinary Training Center?

A Yes, sir.

Q And he came from the Disciplinary Training Center to your office in Leghorn, did he?

A I went down and I picked him up myself.

Q Now, how many times did you see him after he was in the Disciplinary Training Center?

A Two or three times I saw him.

Q How long did each of your interviews with him take place after he was in the Disciplinary Training Center?

A About an hour or hour and a half — two hours at the most.

Q Now, you have testified that on the 15th of September he made a statement, Gusik made a statement, to you?

A Yes, sir.

Q Will you tell us in as much as detail as you can remember how that statement was made and signed?

A Gusik was telling me just what took place and what he done over at the depot and I was writing it down. When he got finished I gave him the papers and he read the statement over.

Q This was what you had written down in your handwriting?

A In my handwriting. I then had it typed up with eight copies, brought the statement back to Gusik. He read it over again. When he finished reading the statement I signed it on the bottom to show that I had warned the man of his rights under the 24th Article of War. Then I brought Gusik in to the Chief Agent, who was Lt. Strano, and he was asked had he been warned of his rights.

Q Who asked him that?

A Lt. Strano. And Gusik said he had. And he was asked if the signature on the statement was his and he said it was. Then he was sworn in to the statement.

Q By whom?

A Lt. Strano.

Q Then what did Lt. Strano do?

A After that he was sworn in, Lt. Strano signed the statement.

Q Who was present when Lt. Strano signed the statement?

A Gusik, myself and Lt. Strano.

Q Now, at any time prior to Gusik making the statement which you wrote down in long hand, did anyone in your presence warn Gusik or advise Gusik of his rights in accordance with the 24th Article of War?

A I warned Gusik of his rights under the 24th Article of War.

Q When?

A When he was first brought into the office by Sergeant Tuck.

Q How did you do it?

A I don't recall the exact words I used, just what I said to Gusik, but I read the 24th Article of War to him from the manual.

Q What manual?

A The Court Martial Manual.

Q Did anyone at any other time in your presence advise Gusik of his rights under the 24th Article of War?

A Yes, sir, just before the statement was signed.

Q Who did it then?

A Lt. Strano.

Q Before he was sworn, or before the statement was signed?

A Before — when I brought him in the statement — he had signed his statement already. And Lt. Strano asked him had he been warned of his rights and he stated he had. He was also asked if the signature on the statement was his signature and he said, "Yes".

Q Well, now, before he signed the statement had anyone advised him of his rights under the 24th Article of War?

A Yes, sir. I advised him of his rights under the 24th Article of War.

Q When?

A Right after the statement was completed, that is, before he signed it and before I signed it.

Q How did you advise him?

A I read the 24th Article of War from the manual. And also before the statement was even started — on the statement there is a little paragraph, a short synopsis of the 24th Article of War, which Private Gusik in my presence read that.

Q Now, on the occasions when you went to the Disciplinary Training Center and brought Gusik into your office prior to September 15th — you said there were two or three such occasions — did anyone advise him of

his rights under the 24th Article of War in your presence?

A I advised him of the 24th Article of War.

Q When?

A Every time I took him out of D. T. C. and before I started questioning him I would advise him of the 24th Article of War.

Q Did you forget to do that one day?

A Yes.

Q And what did Gusik say to you?

A I forgot to warn him of his rights on one occasion and Gusik was very polite to remind me of the fact.

Q What did he say?

A That he hadn't been warned of his rights under the 24th Article of War.

Q What did he say, if you recall?

A He said something — I don't recall the exact words, but something to the effect, "Are you slipping?" or, "What's the matter with the 24th Article of War?"

Q Then what did you do?

A I read the 24th Article of War from the manual to him.

Q Do you recognize that book?

A Yes, sir.

Q What is it?

A That's the Court Martial Manual.

Q Can you find the 24th Article of War in it?

A Yes, sir.

Q Will you do so?

THE COURT: What is the purpose of this?

MR. VOORHIS: Well, I thought I would sak him to read it.

THE COURT: The Court will certainly examine the Articles of War.

THE WITNESS: Here it is.

MR. VOORHIS: All right.

THE COURT: There is no necessity of having this witness inform the Court as to the 24th Article of War.

MR. VOORHIS: All right, sir.

Q Now, on the 15th of September, at the time when this statement was given to you by Gusik, who was present?

A There was Agent Whitmire, myself and a few of the Italian police.

Q Why were Italian police there?

A The Italian police questioned the native civilians involved in this case in both the homicides and the larcenies.

Q Did anyone in your presence touch Gusik —

A No, sir.

Q — that afternoon?

A No, sir.

Q After the statement was typewritten did Gusik read it?

A Yes, sir.

Q Where was the paper at the time he read it?

A All eight copies were laying on my desk. I gave him all of the copies.

Q You handed them to Gusik?

A Yes, sir.

Q Did you keep hold of any part of the paper at the time he read it?

A No, sir.

Q Was the paper folded, the statement folded?

A No, sir.

Q Did you see Gusik read the statement?

A Yes, sir.

Q Did he make any comment?

A No, sir.

Q At the time he signed it was anyone holding his arm?

A No, sir.

Q After the statement was typewritten and presented to Gusik did anyone wrap his arm behind a chair?

A No, sir.

Q Did you direct anyone to twist his arm at that time?

A No, sir.

Q Was any physical force used on Gusik at or about the time he signed that statement?

A No, sir.

Q How did Gusik appear on that afternoon?

A He was calm like he always — like he was from the beginning. He never showed any signs of nervousness or anything.

Q Do you know Lt. Clarence W. Burks?

A Yes, sir.

Q Did he ever mention before the date of trial the Gusik case to you?

A Yes, sir.

Q What did he say about the Gusik case?

MR. PRICE: Object.

THE COURT: Sustained. It is purely hearsay, isn't it?

MR. VOORHIS: I was going to offer it, sir, as some indication that the defense counsel who appeared in Court had made some preparations on the case prior to trial. The statement was not made in the presence of Gusik.

THE COURT: If he has any personal knowledge of what preparation was made he might relate it, but the objection is sustained to the question.

MR. WINDOM: Your Honor please, that is personal knowledge on his part.

THE COURT: Well, if he knows of his own personal knowledge what, if any preparation that the Lieutenant made —

MR. WINDOM: Let him say what was made.

THE COURT: The objection is sustained.

MR. VOORHIS: May I make an offer of proof as to what he would say?

THE COURT: You may make the offer.

MR. VOORHIS: I offer to prove by this witness that Lt. Burks, prior to Gusik's trial by General Court Martial, stated to him that, "I can get that boy off on these charges."

Q Did Lt. Burks as defense counsel of the General Court Martial have access to the C. I. D. reports of investigation in your office?

MR. MORGENSTERN: Objection.

THE COURT: If he knows.

A Yes, sir.

Q Do you know whether or not he examined the C. I. D. reports with respect to Gusik, the homicide and the larceny cases concerning the depot at Tirrenia?

MR. MORGENSTERN: Objection, please.

THE COURT: Overruled.

Q I asked, do you know?

A I am not sure whether Lt. Burks read that report or not.

MR. VOORHIS: No further questions.

CROSS EXAMINATION

By Mr. Direnfeld.

Q Mr. Urdinarrain, are you presently in the service of the United States Army?

A Yes, sir.

Q When did you reenlist?

A In '45.

Q Are you still in the C. I. D. today?

A Yes, sir.

Q Where are you stationed?

A Fort Knox, Kentucky.

Q Now, before you were appointed a C. I. D. Agent were you not sent to C. I. D. school?

A No, sir.

Q You were never present in any C. I. D. investigation school?

A Yes, sir.

Q Where?

A Fort Dix, New York.

Q And for how long?

A Oh, about two years.

Q What made you say that you had never gone to C. I. D. school?

MR. VOORHIS: Your Honor please, he didn't say so.

THE WITNESS: I can explain it.

Q Go ahead, explain it.

MR. VOORHIS: He didn't say so. I think the question is improper.

THE REPORTER: (Reading) "Question: Now, before you were appointed a C. I. D. Agent were you not sent to C. I. D. school?

"Answer: No, sir."

Q Well, now, shall we presume from that you did not attend any C. I. D. school before you became an Agent? Is that correct?

A I went to school, sir.

Q Before you were appointed an Agent?

A Yes, sir.

Q Now, tell us why you said the first time you hadn't gone to school?

A Well, because there is strictly a C. I. D. school at Fort Cally Barracks, which at that time they didn't have the C. I. D. instruction and I was with the Military Police Battalion.

Q Yes.

A Which was nothing but a school for a period of two years.

Q And in this C. I. D. school you studied the Articles of War pretty thoroughly, did you not?

A Yes, sir.

Q Now, tell the Court what insignia, if any, Criminal Investigation Agents wear?

A There are two types of insignia: U. S. buttons on your collar, or a U. S. patch on your sleeve.

Q Neither one of which denote any rank; is that right?

A Correct.

Q Now, tell me from your own experience, by reason of not having stripes have you ever been mistaken for an officer?

A Yes, sir.

Q Quite often?

A Yes, sir.

Q It is a common practice, is it not?

A Yes, sir.

Q To refer to the C. I. D. agents as Lieutenant; is that correct?

A No, sir.

Q Or officer?

A No, sir.

Q Tell me why people think you are an officer?

A They just get that idea. Many people address me as a major, the same way as Gusik addressed me as a lieutenant.

Q Did you correct him when he called you lieutenant?

A Gusik never called me lieutenant to my face.

Q Didn't you just state that he called you lieutenant?

A I happen to know Gusik to address me as lieutenant.

Q How do you know that?

A I read the report.

Q Now, during the time that you were Criminal Investigation Agent approximately how many homicides would you say you investigated?

A Roughly about fifteen.

Q Does this investigation with which we are concerned here today stand out in your mind for any particular reason?

A No, sir.

Q In other words, you would be just as refreshed about any other of the 15 homicides as you are about this one?

A No, sir. The dates — it is a year ago. I don't remember exactly everything.

Q Have you refreshed your memory before coming in this court room?

A A little bit, sir.

Q Now, will you tell the Court how you refreshed your memory before coming into this court room?

A I was just reading the case that I myself wrote up.

Q Are those the notes that you wrote up?

A Yes, sir. Not that — just the case itself.

Q Did you type this?

A No, sir.

Q Who typed it?

A Clerk.

Q When was this typed?

A Oh, I'd say about maybe two or — a day or two after I had finished writing it up.

Q Was every statement in here taken by you personally

A Most of them were taken by me personally?

Q And as to those which were not taken by you personally: They are not your records, are they?

A No, sir.

Q In other words, these are not your personal notes, are they, taken at the time that you had any of these conversations

A Oh, yes. I am aware of everything that is in the statements there.

Q Now, let me see. I think you are a little confused. At the time, say, for instance, you interviewed one of the witnesses in connection with this investigation, did you make notes?

A Yes, sir.

Q Are these the notes that you made at the time you interviewed the witness?

A No, sir.

Q This is a report which was made after the entire investigation by C. I. D. was complete; is that correct?

A Correct, sir.

Q Part of which is not your work; is that right?

A That is right.

Q Now, the Criminal Investigation Section is, in effect, the detective bureau of the Military Police; is that about right?

A Yes, sir.

Q Would that be a fair statement?

A Yes, sir.

Q And you oftentime work in civilian clothes, too; is that correct?

A Yes, sir.

Q Now, in your opinion, would you say that a thorough investigation had been made of this case?

A Yes, sir.

Q Would you say that a fair investigation had been made?

A Yes, sir.

Q Now, this case originally came to your attention how?

A Through the Provost Marshal's office.

Q Through the Provost Marshal's office. Who at the Provost Marshal's office first brought it to your attention?

A It was brought to my attention by the Chief Agent of C. I. D.

Q And what was his name?

A Henry L. Manfredi.

Q He is your superior, or was your superior at that time?

A Was, yes, sir.

Q When you were assigned this case, what is the first thing you did?

A Well, I was assigned to the case. When I got to the depot the bodies had been taken just a matter of a half hour or so, when I got there, see?

Q In other words, you were assigned to this investigation within a very short time after the shooting?

A Yes, sir.

Q You arrived at the depot and you saw some bodies; is that right?

A No. I think they were just taken away, had been taken away.

Q I see. Then what did you do?

A Well, we got the photographers there. We took photographs of the scene and I spoke to Gusik. He was telling me where he was standing, where he was shooting from.

Q All right, now, let's see if I get this straight. This is immediately after the shooting you spoke to Gusik?

A I am pretty sure I spoke to Gusik that same night of the shooting.

Q All right. And this was right at the fence?

A Well, we were near the fence.

Q Or near the fence. And what did Gusik tell you?

A He told me that he had heard some noises and he had challenged these noises he had heard.

Q Yes.

A And then he was behind a rock crusher when someone had fired a shot on him.

Q Yes.

A And that he challenged them again and then he opened fire.

Q Now, he told you about someone firing in; is that right?

A Yes, sir.

Q And he also told you about calling the challenge?

A That's right.

Q And about firing. Did he tell you about others firing also?

A Yes, sir. He told me about another boy was firing.

Q Who was the other boy?

A I don't recall his name.

Q Was it Private Zahurones?

A I think it was Zahurones.

Q And did you talk to Zahurones?

A Yes, sir.

Q And did Zahurones tell you that he had fired?

A Yes, sir.

Q Now, did you talk to anyone else that evening while on the compound?

A I talked to some of the Italian guards.

Q Did some of the Italian guards tell you they also fired?

A Yes, sir.

Q Did some of the Italian guards tell you that they had heard shots fired from the outside in?

A No, sir.

Q You are certain of that?

A I don't recall it, sir. It is a year ago and I don't recall just exactly who I spoke to or just—

Q Well, if I were to show you a statement taken by you from an Italian guard to the effect that he had heard a shot, or heard shots, fired in from the outside, would you then change your statement?

A Yes, sir.

MR. VOORHIS: Your Honor please, is this helpful?

THE COURT: I was wondering what is the purpose of all the details concerning the crime.

MR. DIRENFELD: Your Honor, if the Court will bear with us we will show the investigation that was made in this case. If the Court will bear with us we will tie it up very, very nicely.

THE COURT: The Court does not intend to retry the murder case.

MR. DIRENFELD: We are not going to retry the murder case. Our petition alleges constitutional deprivations, and we think that the best way to show them is to bring before the Court the enlarged picture and not mere extracts of the picture.

THE COURT: Do you desire to be heard, Colonel?

MR. VOORHIS: I have no objections to going into this as deeply as you wish, sir, if it is at all helpful. I fail to see the materiality of this line.

THE COURT: Well, it seems to the Court that we have had a rather wide latitude throughout this trial.

How far do you expect to go with this type of testimony? Do you intend to go into all the details of the shooting?

MR. DIRENFELD: No, sir.

THE COURT: You may proceed.

MR. VOORHIS: Maybe we can cut it short. We have here copies of the C. I. D. investigation on the homicides and we have here copies of the C. I. D. investigation report on the larcenies. If we can save time, we will just introduce them in evidence, if he wants them.

THE COURT: Is there any reason why those reports cannot be submitted?

MR. VOORHIS: I don't offer them, sir. I don't think they are pertinent. I don't think they would be helpful to you, but—

MR. DIRENFELD: If Your Honor please, the testimony presently before this Court is in conflict. Some points are directly in conflict.

THE COURT: Well, do you expect this Court to weigh the testimony submitted to the court martial court?

MR. DIRENFELD: No. No, Your Honor. We expect that this Court in passing upon the due process phase, which is alleged in the petition, must determine the weight of evidence and it must determine the credibility of the witnesses.

THE COURT: Do you have any authority for that statement?

MR. DIRENFELD: To determine the credibility of the witnesses?

THE COURT: Yes, the weight of the testimony. Suppose there is no substantial evidence to support this record; do you mean to infer that this Court must hear all the testimony and determine whether or not this man was guilty of the crime charged?

MR. DIRENFELD: No, Your Honor.

THE COURT: What do you mean by determining the weight and credibility?

MR. DIRENFELD: I am talking about the habeas corpus proceedings in this Court. This Court eventually will determine whether or not the Petitioner has shown by a preponderance of the evidence a denial of due process, and in determining whether or not the Petitioner has sustained that burden it must look to the testimony concerning denial of due process that was heard in this court room. That is what I meant by the credibility of the witnesses who are testifying concerning the denial of due process.

THE COURT: Well, this case may eventually resolve itself into a jurisdictional question only. I am not prepared to say at this time. I have been permitting you gentlemen to unfold everything you have. I told you at the outset I would listen to the story.

MR. DIRENFELD: We appreciate it, Your Honor, and for the purpose of the record we should like to do that.

THE COURT: But the Court does not intend to indicate at this time whether or not this evidence is proper. It may all have to be excluded at the proper time.

Now, whether or not you intend for the Court to sit here and listen to all the details of this crime, if a crime was committed, is a question which disturbs the Court. We might be here a week if you intend to do that.

MR. VOORHIS: The particular issue now, sir, is, is it helpful to you to know whether this witness remembers what an Italian guard said to him in August of 1947.

MR. DIRENFELD: As you will see—it was brought out by direct examination of the Respondent here—the conclusion that is attempted to be drawn on direct examination is that a fair, thorough and impartial investigation was conducted.

The Court hasn't indicated how it will treat this case, but even if the Court decided to treat it as a jurisdictional question, Article of War 70 provides for a fair and thorough, impartial investigation, and failure to provide it

ousts the court martial board of jurisdiction. So we say under either theory we have a right to show denial of due process. One of the most damaging things in the entire trial are some of the activities by the C. I. D. investigating officer.

MR. VOORHIS: Your Honor please, I make one comment. Urdinarrain was not the investigating officer.

MR. DIRENFELD: No?

MR. VOORHIS: He had nothing to do with the investigation. Anything he says—I can't see how it would affect the investigation conducted under the 70th Article of War. The full report of investigation conducted by a duly appointed investigating officer under the 70th Article of War is before this Court as part of Respondent's Exhibit A.

THE COURT: Well, now, how do you expect to supplement this record at this time? Are you impeaching the record? He didn't make the record.

MR. VOORHIS: He did not make the investigation.

MR. DIRENFELD: He did not make the investigating officer's investigation, but he did make the C. I. D. investigation, which has already been offered in evidence by the Respondent and accepted by the Court.

MR. VOORHIS: The C. I. D. investigation I do not believe is in evidence.

MR. DIRENFELD: Was this submitted?

MR. VOORHIS: Yes, but that is not the C. I. D. investigation.

I beg your pardon. There are portions of it included in there attached to the other investigating officer's report.

THE COURT: In view of the line which this testimony is taking, perhaps the Court had better check this transcript. It is rather a voluminous transcript.

MR. DIRENFELD: Yes, it is.

THE COURT: You gentlemen are not in accord as to what is in the record.

MR. DIRENFELD: I think the Colonel now agrees that it is in there.

MR. VOORHIS: Your Honor, I had forgotten that a portion of it was included in the investigating officer's report.

THE COURT: Read the last question and answer.

THE REPORTER: (Reading) "Question: Well, if I were to show you a statement taken by you from an Italian guard to the effect that he had heard a shot, or heard shots, fired in from the outside, would you then change your statement?

"Answer: Yes, sir."

THE COURT: What statement are you referring to? He didn't make the investigation?

MR. DIRENFELD: Oh, yes, he did.

THE COURT: He made the C. I. D. investigation.

MR. DIRENFELD: That is right, and it is part of the file on record here.

THE COURT: Now, what is the basis of your objection?

MR. VOORHIS: My statement to you was, was this helpful to you in determining any issue before you, whether or not he now remembers whether an Italian guard said to him in 1947 he heard a shot fired.

THE COURT: Well, that isn't the question.

MR. VOORHIS: Well, the statement is a part of the record.

THE COURT: That isn't the question, Colonel. It is whether or not it might change his answer. He may answer if he knows.

THE WITNESS: I don't recall.

THE COURT: There is quite a record in this case, and some exhibits have been offered today which the Court has not had the opportunity of examining. Will you be able to conclude today or not?

I think at this time the Court will take a recess until tomorrow at ten o'clock. There are some points in the case which counsel have indicated they desire to argue.

For example, the gentleman wanted to make a chronological statement of what is in this record. I have no desire to deny him that right, but it will be impossible to hear him tonight. I think the case will go over until ten o'clock tomorrow.

MR. VOORHIS: Would Your Honor excuse me from further attendance under those circumstances? I have a date with the District Court of Kansas tomorrow morning.

THE COURT: Yes. Did you care to argue the case at this time?

MR. VOORHIS: No, sir, not until the evidence is in.

THE COURT: Well, Colonel Windom advised the Court that there would probably be a request for further time in which to take depositions before the case is finally submitted.

MR. CHAPMAN: That is correct, sir.

MR. VOORHIS: That is one of the things we have to decide, is whether to request depositions to be taken from two witnesses.

THE COURT: You will have one more witness?

MR. VOORHIS: We have one more here present today.

THE COURT: Well, now, you gentlemen wanted to make a speech in the record about what this record shows, didn't you—the gentleman back here?

MR. DIRENFELD: Yes, we have that.

THE COURT: Well, the Court has a few questions he desires to ask all of you at the proper time. Of course, it can come when the case is finally submitted.

You won't be able to submit your side of the case today, that is, for the Government.

MR. VOORHIS: Not without concluding the evidence.

THE COURT: Well, I assume that you will make your request, as indicated by Colonel Windom, to take depositions. You will only have one more witness at this time.

Counsel for Petitioner will oppose that request?

MR. DIRENFELD: Yes, we will, Your Honor.

THE COURT: The Court will listen to you tomorrow at ten o'clock.

And thereupon the further hearing of the case was adjourned until Thursday, September 9, 1948.

THURSDAY MORNING SESSION
September 9, 1948

R. P. Urdinarrain

resuming the stand for further cross examination, testified as follows:

Cross examined by Mr. Direnfeld.

THE COURT: Will you read the last question.

Reporter reading:

"Question: If I were to show you a statement taken by you from an Italian guard to the effect that he had heard a shot, or heard shots fired in from the outside, would you then change your statement?

"Answer. Yes, sir.")

Q I will show you a statement in what purports to be Government's Exhibit A, a statement which shows the signature of Cellauro Angelo, and I will ask you to read starting with the sentence "Almost—.

A "Almost in the same time, also the other American soldier started to fire; the shooting continued for several minutes. Also from the woods, some shots were fired. I also fired with my gun towards the woods."

Q In other words, you are now going to change your testimony and state that Italian guards also conceded that they fired, too, is that right?

COL. CHAPMAN: I object to that. He never made any statement to the contrary.

THE COURT: Sustained.

Q You will also state at this time that the Italian guards fired simultaneously, is that correct?

COL. CHAPMAN: Well, now, if the Court please, I object to the form of that question because the statement which counsel is cross examining Mr. Urdinarrain on is a statement made by an Italian witness. This witness does not state the Italian guards fired. The Italian guard so stated. All he has in evidence before him is a statement made by an Italian guard.

MR. DIRENFELD: The original question asked of him was: Did he take a statement from an Italian guard to the effect that the Italian guard had fired at the same time that Gusik fired.

COL. WINDOM: Beg your pardon. Read the record.

MR. DIRENFELD: The original question of yesterday afternoon was: Did the Italian guard hear a shot fired into the Depot.

Q On the basis of the statement you have just heard, Mr. Urdinarrain, you did take a statement that Italian guards heard a shot fired into the Depot, is that right?

A Yes, sir.

Q Now, you were telling us yesterday you arrived at the Depot shortly after the bodies were taken away?

A Yes, sir.

Q And that you then talked to Gusik and he told you what had occurred?

A Yes, sir.

Q And you spoke to Zahurones, and you spoke to Italian guards. What did you do after that?

A Well, the Italian guards — they stated that they had fired some shots over towards the wooded area.

Q Now, who else did you talk to, if anyone, in addition to the Italian guards, Gusik and Zahurones?

A Well, I spoke to the Corporal of the Guard, Sergeant of the Guard and Officer of the Day.

Q Now, did you have occasion to speak to the Officer of the Day at any time subsequent to the night of the shooting?

A Yes, I spoke to him. It was several hours later, after the bodies were taken away.

Q Did the Officer of the Day show you a written statement that he had received from Tom Gusik?

A No, sir, I don't recall that.

Q Did he ever tell you that he had received a written statement from Thomas Gusik?

A No, sir.

Q Do you know from your own knowledge whether or not Tom Gusik submitted a written statement that night?

A No, sir, I don't.

Q Now, yesterday morning, you testified the first time you saw Gusik was about August 15; that was in the morning. In the afternoon you stated it was sometime in September, is that right?

A Sometime in September.

Q Did you discuss this case with anyone during lunch time yesterday?

A Yes, sir.

Q With whom?

A Both Colonels?

Q Colonel who?

A Colonel Chapman, and I don't recall the other Colonel's correct name.

Q And did they refresh your memory that it wasn't August 15, but September?

A No, sir, I read that from my own record.

Q That was not discussed during your noon recess?

A No, sir.

Q You learned yourself that the first time you saw him was in September?

A Yes; the first time I spoke to him.

Q Now, actually the first time you spoke to him was the very night of the shooting, August 13, wasn't it?

A That is correct.

Q In other words, both of those statements of yesterday are false?

A I just don't recall the exact date. It was several hours after the incident that I actually spoke to him.

Q Will you refer to your records to see if August 13 was the date of the shooting.

A August 13.

Q Both of those statements of yesterday were false, were they not?

A Yes sir.

Q Now, Mr. Urdinarrain, in the criminal investigation department you have a daily activity sheet which you keep, is that correct?

A Yes, sir.

Q And will you tell the Court what is entered on that daily activity sheet?

A On the daily blotter you make your entries as to people you question, people you interview, people you arrest and release.

Q How long you question?

A How long you question them.

Q Do you have those sheets in that envelope?

A No, sir.

Q Where are those sheets?

A They are in the file office in Italy..

Q Where did you get these files which you have presently with you?

A They were handed to me by the Chief Agent.

Q In Italy?

A In Italy.

Q And you did not bring your other files on your daily activity?

A No, sir.

Q But your daily activity sheets would show how long you spent interviewing each and every witness, would they not?

A Yes, sir.

Q May I ask you what your other records are in addition to the typewritten record which you showed me yesterday?

A Just the copy of the case itself; of the homicide and another copy of the larcenies.

Q That is the only record you have with you?

A The only records.

Q Isn't it also a practice in CID to keep your personal notes?

A No, sir.

Q You don't attach them in a separate envelope to your files?

A No, sir.

Q Now, after you interviewed Gusik on August 13 do you know whether or not he was on duty after that?

A Yes, I think he was put on duty for a few days; then he was taken off duty.

Q How long was he off duty?

A I think he remained completely off duty until he was sent to DTC.

Q Will you refresh your memory by your records; make certain of that? Actually, wasn't he on duty for two weeks after that?

A I don't recall when he was on duty. He was still in the company and he was being taken care of by the Security. I don't know. I heard they had him on duty for several days, but how long I don't know.

Q Is Provost Sgt. Tuck a member of your office?

A No, sir.

Q Does he have liaison with your office?

A At that time, yes, sir.

Q He was a liaison man between CID—

A And the Security, yes, sir.

Q Did you have occasion to discuss this case with, or interview Provost Sgt. Tuck?

A Yes, sir.

Q Did Provost Sgt. Tuck show you the statement he took from Gusik?

A I don't recall that Sergeant Tuck ever gave me any statement from Gusik.

Q Did he tell you about a statement he took?

A No, he just told me that he was taking statements, but he didn't tell me from who.

Q And, he never showed them to you?

A No, sir.

Q Where are the statements he took?

COL. CHAPMAN: Now, if the Court please, I object to the form of that statement. There is no proof there are any such statements.

THE COURT: Sustained.

MR. DIRENFELD: If the Court please, the answer was that he stated he was taking statements.

COL. CHAPMAN: That Tuck was, not Urdinarrain. How can Urdinarrain know about any statement he never even heard of?

MR. DIRENFELD: Because he is attached to the office of CID.

COL. CHAPMAN: No, he is not attached to the Security Office of CID.

Q Do you know what happened to any of the statements that Sergeant Tuck said he was taking?

A No, sir, I don't.

Q Did he ever show any of them to you?

A No, sir.

Q Now, when Gusik was restored to duty, who issued the order restoring him to duty, if you know?

A I don't know, sir.

Q You do know, however, the shooting was ruled a justifiable homicide?

COL. CHAPMAN: I object to the form of that question.

THE COURT: Sustained. You have no right to assume matters which are not shown in the record.

Q When he was restored to duty, did the CID rule that it was a justifiable homicide?

COL. CHAPMAN: I object, if the Court please.

COL. WINDOM: What the Commissioner does in a preliminary hearing has no bearing on what the Grand Jury or this Court does.

MR. DIRENFELD: We are going to show the manner, as I stated to the Court yesterday, in which this investigation was conducted, and we want the Court to have the entire picture and not fragments.

THE COURT: He may answer if he knows. Overruled.

A At first we were under the impression that it was justifiable homicide.

Q And, he was so restored to duty. Now, after the night of the shooting, when next did you talk to Tom Gusik?

A I think he was brought into the office the following day by Sergeant Tuck, or two days after. I don't recall just how many days.

Q Will you look at your records and refresh your memory as to when Tom Gusik was brought in by Tuck.

A (After looking at records) It was in August, a day or two after the shooting.

Q You are certain of that?

A Yes, sir; the first day he was brought into the office.

Q You are very certain it was about two days after?

A Two or three days after.

Q Now, who questioned him?

A I did, sir.

Q Who else?

A No one else.

Q Just you alone?

A Well, I wasn't alone in the office. There was Agent

Whitmire and a few Italian police, but I was the one who spoke to him.

Q All right, and what did Tom Gusik tell you at that time?

A He told me that he was on guard duty and that he heard some noises over at the wire fence, he challenged the noise and no one answered and then he opened fire.

Q Which was, in substance, the same thing he told you the night of the shootings, was it not?

A Yes, sir.

Q Was that statement reduced to writing?

A No, sir.

Q It was not?

A No, sir.

Q And then, what was done with Gusik?

A Gave him back to Tuck; Tuck took him back to the Depot.

Q Took him back to the Depot. Is that the time he was restored to duty?

A I don't know when he was restored to duty.

Q When was the next time that you spoke to Tom Gusik?

A I don't recall exactly the next time I spoke to him, but we had him come in the office several times. Brought in by Tuck. We questioned him in regards to the homicide and the larcenies over at the Depot.

Q And, what were his statements on each of these several time that he was brought into the CID office?

A There were no statements taken.

Q Did you talk to him?

A I spoke to him.

Q What was the essence of his conversation with you?

A In connection with the larcenies and the homicide in the Depot, but there were no statements taken.

Q What did he say happened?

A He said the reason he shot these two Italians was because they were trying to get into the Depot. He

challenged them, no one answered and he opened fire.

Q None of those statements were reduced to writing, is that right?

A No, sir.

Q When was the next time you talked to Tom Gusik?

A I'd say in the month of August Sergeant Tuck must have brought him up about three or four times.

Q Now, on what date was he placed under arrest?

A (Referring to records) He was confined in DTC on the 3rd of September.

Q On the 3rd of September?

A Yes, sir.

Q Are you sure it was not August 31?

A The record says it was the 3rd of September.

Q Now, at that time what was he told when he was brought into the office?

A We had rounded up some of the civilians.

Q Excuse me; answer the question. What was he told when he was brought into the office?

COL. WINDOM: On what date?

MR. DIRENFELD: On the date on which he was arrested.

COL. CHAPMAN: By whom?

Q Did you talk to him that day?

A I spoke to him, yes, sir.

Q What did you say to him?

A I told him we had enough evidence, witnesses to show that he knew about these Italians coming into the Depot, that he had invited them inside to steal.

Q And, what did Tom say in reply to that?

A He said it wasn't so.

Q All right, was that statement where he denied it reduced to writing?

A No, sir.

Q And, how long did you interrogate him that day?

A I don't recall just how long it was.

Q Would you say fifteen minutes?

A No.

Q Or, would it sound more like the entire day?
A I will say approximately two or three hours.
Q And, was that in the morning or afternoon?
A That was in the morning.
Q In the morning. And, that was at the CID office.
A Yes, sir.
Q Was he told that he was charged with murder?
A No, sir, he wasn't told that.
Q What was he told that he was charged with?
A He wasn't told that he was charged with anything. Just told him that he was going to be confined in DTC.
Q For no reason?
A He was going to be confined to DTC on homicide of these two civilians.
Q What do you mean by the homicide of these two civilians?
A We told him we had enough evidence to show that what he said wasn't true and that he was going to be put in DTC until the whole investigation was completed.
A And you said that he is going to be charged with murder, is that correct?
A No, sir.
Q Who else was in the office with you at that time?
A I don't recall just who was in the office.
Q You don't know whether Lieutenant Strano was there, do you?
A No.
Q You don't know whether Whitmire was there, do you?
A I don't recall, sir.
Q You don't recall who was there, but you are certain he wasn't charged with murder?
A No, sir.
Q Now, up until that day he was brought in and placed in DTC you had interviewed him several times, is that correct?
A Yes, sir.

Q And, each time he had re-affirmed the very same facts of occurrence which he had the night that you talked to him after the shooting, is that correct?

A Correct, sir.

Q None of those statements were reduced to writing?

A No, sir.

Q Will you tell us why.

A There was still people that had to be rounded up that we couldn't find. The people that we had in custody—everyone of them stated that Gusik new all about this, and on several occasions that Gusik was brought to the office he wasn't brought in just to be questioned on the incidents of the homicide. The majority of it he was questioned more on the larcenies.

Q Now, for that reason you preferred to believe the statements of other people, and would not accept his statement, is that correct?

A That is correct, sir.

Q You wanted no part of his statement?

A That's not so.

Q Had you taken statements of persons that said he was aware of it?

COL. WINDOM: If Your Honor please, I suggest that Your Honor enforce the rules of this Court. I realize we have out-of-town counsel on both sides. Your Honor normally request counsel to remain seated and not to approach the witness.

THE COURT: Yes, that is true, gentlemen. The Court didn't advise you at the start of the trial. You may have a different practice in Cleveland. The practice in this Court is that counsel remain seated during the examination unless it is necessary to approach the witness for the examination of an exhibit.

MR. DIRENFELD: It is a long way across here.

THE COURT: The Court didn't instruct you, so counsel will take a seat. You will conduct your examination while seated, unless it is necessary to approach the

witness for the examination of an exhibit. You may have a different practice in Cleveland.

MR. DIRENFELD: Yes, Your Honor, in Federal Court in Cleveland the cross examination is from the rostrum.

THE COURT: The Court didn't advise you. Counsel for the Government has been doing the same thing you have been doing.

Q Now, when Gusik was placed in DTC you stated it was on September 3.

A Yes, sir.

Q Now, will you describe to this Court what the DTC is.

A Disciplinary Training Center.

Q And, what does it consist of; describe it.

A Well, it consists of all military personnel who have been tried and court martialed; military personnel awaiting court martial; military personnel held for investigation.

Q What were there sleeping facilities?

A I don't know what their sleeping facilities were.

Q Now, don't you know there were pup tents?

A They have pup tents and they have barracks, pareaple tents.

Q Do you know in which one Gusik was confined?

A No, sir.

Q Now, there were no charges placed against him on September 3, is that right?

A Yes, sir.

Q After you questioned him that day, you sent him to DTC?

A I didn't send him to DTC.

Q Who sent him to DTC?

A The Commanding Officer.

Q His Commanding Officer?

A Yes, sir.

Q Upon what basis, if you know?

A In CID we don't confine no one to DTC. The only one who can confine military personnel to DTC is his own Commanding Officer.

Q Now, you testified yesterday that when he was brought in on the occasion of the date of his arrest you read the 24th Article of War to him, is that correct?

A Yes, sir.

Q Out of the manual?

A Yes, sir.

Q And you read that to him before you asked him a single question?

A No, I spoke to him a few minutes before I read the 24th Article of War to him.

Q Well, actually didn't you ask him again about what had occurred on that evening?

A Yes, sir.

Q Now, actually, you didn't read the 24th Article of War to him until some time later, isn't that right, Mr. Urdinarrain.

A Yes, sir, several minutes after I read the 24th Article of War.

Q Several minutes later?

A Yes, sir.

Q It wasn't the end of the day?

A No, sir.

Q Now, that was the first time he was in the office, wasn't it?

A No, sir. I am talking about the second time or third time.

Q The date he was arrested?

A The first time he was brought in was the first time.

Q The day he was arrested, that is the day you read the Article of War 24, is that correct?

COL. CHAPMAN: What date is that?

MR. DIRENFELD: September 3, the day he was arrested.

A He was confined to DTC on September 3 and he had already been in the office previous to that.

Q He had been in the office previous to that. Now, did you read the Article of War 24 to him on September 3?

A Yes, sir.

Q And, did you explain it?

A Yes, sir, I read it to him from the manual.

Q And did you explain it further?

A Yes, sir.

Q Tell us what you told him in explaining the 24th Article of War.

A I don't recall the exact words. I told him he didn't have to make a statement if he didn't want to, and if he made a statement it could be held against him.

Q In other words, you told him he didn't have to make a statement?

A Correct, sir.

Q Now, I am going to ask you, Mr. Urdinarrain, on the date you went to the scene of the shooting were you carrying the Court Martial Manual on your hip or in any other pocket?

A No, sir.

Q Did you read the 24th Article of War to him at the Depot?

A No, sir.

Q Did you read the 24th Article of War to him when you questioned him after that at the Depot?

A No, sir.

Q Did you read the 24th Article of War to him at any time before September 3?

A Yes, sir.

Q When?

A When he first was brought to the office.

Q And when was that?

A That was several days after the incident, the 13th of August.

Q Several days later?

A When he was brought in the office.

Q And, in between that time, you have testified, you had questioned him several times, is that right?

A At the Depot?

Q At the Depot.

A Just a matter of maybe fifteen or twenty minutes, at the most.

Q Each time?

A Well, I don't recall how often I spoke to him at the Depot, but it was no more than fifteen or twenty minutes.

Q Mr. Urdinarrain, didn't you state that when you talked to him after that he was sent back to duty? Now, you didn't take any statement at that time, did you?

A No, sir.

Q You didn't read any 24th Article of War to him?

A No, sir.

Q All right, the first time you read the 24th Article of War was September 3, is that correct?

COL. CHAPMAN: He has just answered that he did it on the 15th of August. This is the third time; I object to this repetition.

MR. DIRENFELD: I am—

COL. CHAPMAN: May I make my objection, sir?

THE COURT: You may state your objection.

COL. CHAPMAN: I object on the grounds that it is repetetious; it has been answered about three times. The witness has stated he read him the Article of War on the 15th of August when he was first brought into the CID office. He has repeated that three or four times, and I think that the question has been answered and was responsive to the question.

MR. DIRENFELD: If the Court please, the witness stated yesterday that the first time he talked to him was August 15. Then, he said sometime in September. How could he have stated such a thing as that?

THE COURT: Objection over-ruled. He may answer if he knows.

MR. DIRENFELD: Will you read the question?

(Reporter read the question):

"Question. All right, the first time you read the 24th Article of War was September 3, is that correct?").

A The first time I read the 24th Article of War was several days after the incident.

Q Several days. Now, the incident occurred on August 13. I think on August 15 he was restored to duty and on September 3 he was arrested. Now, when was the first time that you read the 24th Article of War?

A I think maybe two days, probably two or three days after the incident, about August 15 or August 16. The first time he was brought in the office.

Q That was the first time you read it. You don't have those time sheets or records to show that?

A No, sir.

Q Your records don't show that?

A No, sir.

Q When is the first time, according to your records, you read the 24th Article of War?

A My records show the date I took the statement.

Q And, what date was that?

A I think it was the 15th of September.

Q And, that is the time it shows you read the 24th Article of War, is that correct?

A That shows the date the statement was actually taken.

Q None of your records show the reading of the 24th Article of war before that, do they?

A No, sir.

Q Would your blotter report show that?

A No, sir, it wouldn't show that.

Q Now, in the course of your investigation, you then called Gusik back to the CID office—when?

A Several days after he was in DTC, confined to DTC.

Q Well, would say a week, two weeks?

A I couldn't say, I don't recall.

Q And; who was present at that time?

A I don't recall who went with me, but I went down myself and got him at DTC.

Q And, what did you question him about?

A Questioned him mostly on the larcenies.

Q And, you didn't discuss murder with him?

A We also discussed the homicide, but mostly it was on the larcenies.

Q What do you mean, mostly?

A Well, we were waiting to see if we could find one more witness, and most of the questions the first time after we brought him from DTC mostly had to do with nothing but the larcenies.

Q Mr. Urdinarrain, do you know Colonel Orsinger?

A Yes, sir.

Q Did you ever have any conversation with him about this case?

A I don't recall, sir.

Q You don't recall?

A No, sir.

Q You talked to Colonel Orsinger that often that you don't remember your discussions?

A I don't recall.

Q Did you ever talk to his Executive Officer?

A I might have but I don't recall.

Q Did you ever discuss this case with the Adjutant?

A I don't recall.

Q You discussed this case with your Lieutenant in CID, did you not?

A Yes, sir.

Q Did he tell you that the Colonel ordered that someone must be charged with murder?

COL. CHAPMAN: I object to that. It is calling for a hearsay answer.

THE COURT: Over-ruled.

COL. CHAPMAN: Exception.

Q In your discussion with him, were you told such a thing?

A No, sir.

Q Now, in the course of your investigation as a CID agent you interviewed several other people, did you not?

A Yes, sir.

Q Among the people you interviewed was an Italian doctor, is that correct?

A Yes, sir.

Q I think he was from the University of Pisa?

A Yes, sir.

Q Did the doctor show you the bullets that had been removed from the bodies of these men?

A Yes, sir.

Q He did. Were these bullets of the same size?

A He showed me just one, one bullet. The casing was all cut up and it wasn't any good for ballistics.

Q Now, Mr. Urdinarrain, you have a report in your file, do you not, from the doctor at the University?

A Yes, sir.

Q And, in his report does he not state that he removed two bullets from one body of different sizes, and three bullets from another body of different sizes?

A Yes, sir.

Q Did he not offer the bullets to the military authorities?

A He brought us down one or two bullets.

Q Now, I will ask you, was a ballistics test made of those bullets?

A No, sir.

Q Now, I want to ask you if any test firings were made of Gusik's weapon?

A No, sir.

Q In that report of the doctor, did he not state it was his opinion one of the bullets was fired from a small pistol?

A I don't recall that in the statement.

Q Will you refresh your memory?

A (Looking at the records.)

Q Have you been able to find it?

A I have been able to find it.

Q And does he so state?

A He states "...led us to think that it was a small caliber bullet."

Q I will show you the statement here of Professor Carpio, and I will ask you to read this sentence.

A "We must think of a fire-arm with only one bullet, of small caliber (as it is demonstrated by the small size of the entrance hole located on the left emithorax, at the level of the 2nd rib)."

Q That is in reference to one body. In reference to the other body did he not say that "...we must assume that the fire arm used was a long one . . . most likely a war rifle."?

A Yes, sir.

Q Now, I am going to ask you what kind of weapon Thomas Gusik carried.

A An automatic carbine.

Q A carbine is smaller than a rifle, is that correct?

A Yes, sir.

Q A carbine is much larger than a pistol, is that correct?

A Yes, sir.

COL. CHAPMAN: What do you mean by those terms? What do you mean by caliber, for the record?

MR. DIRENFELD: The fire power and size, and the armature of the bullet.

COL. WINDOM: For clarification of the record, ask him what is the caliber of the carbine.

Q Now, I want you to tell me whether or not a rifle carries a larger and rounder bullet than the carbine.

A Yes, sir.

Q I want you to tell me whether or not a pistol carries a much smaller and narrower bullet than a carbine.

COL. WINDOM: I object. What caliber pistol?

THE COURT: Yes, there are different types of pistols. In order to make comparisons you will have to be more specific.

COL. WINDOM: You and I both know the question; let's not confuse the question.

MR. DIRENFIELD: I think the witness knows the question also.

COL. WINDOM: Is there any contention on the part of the Petitioner that the caliber of a carbine is different from an M-1 rifle?

MR. DIRENFELD: It is our contention that it uses a much larger bullet, a rounder bullet, and it has greater fire power.

COL. WINDOM: The calibers are identical, is that admitted for the record?

MR. DIRENFELD: We do not admit that for the record. We are cross examining here the size of openings that those bullets make.

COL. WINDOM: Just so we know what to prove.

Q Now, in view of the fact that you had the doctor's statement that there was a pistol, a war rifle, didn't you think it good CID practice to have a ballistics test made?

A I took the bullets to the ballistics expert and he stated that a ballistics test was impossible; the shell was all opened up, all cut up and he couldn't take a ballistics test on it.

Q Now, Mr. Urdinarrain, you stated you went to CID school, did you not?

A Yes, sir.

Q You studied weapons, did you not?

A Yes, sir.

Q They taught you in that school that even a bullet which has ricocheted, even a bullet which has been bent, can be determined from which gun it was fired, is that correct?

A I am not a ballistics expert.

Q No, but they taught you that in your CID school, did they not?

A Yes, sir.

Q They didn't tell you how to do it, but they told you it could be done?

A Yes, sir.

Q And you had a ballistics expert?

A Yes, sir.

Q And, none was made?

A Yes, sir.

Q Now, I am going to ask you further, did the Italian guards carry large war rifles?

A They carried Italian carbines and they also—some of them carried 44 pistols.

Q Some of them carried a pistol, and did not the majority of them carry the large rifle which compares to our M-I or M-3 rifle?

A Some of them, not all of them.

Q But, none of the American soldiers were carrying rifles at that time, were they?

A They were carrying carbines.

Q They were carrying carbines; and you didn't think it important to send those bullets on to a laboratory for ballistics test?

A I sent them on.

Q All of them?

A I sent both of them.

Q What happened to the bullets after you gave them to the ballistics expert?

A They sent a letter down and said ballistics was impossible.

Q What happened to the bullets?

A The ballistics has them.

Q Then, where did the Professor get the bullets he presented in the Court Martial trial?

A They were brought down from Rome.

Q And, did he offer them to the military authorities, again?

A I think he did, sir.

Q Now, did you interview a Private Parker?

A Yes, sir.

Q Did you know that Parker had a criminal military record?

A Yes, sir, I think he told me something about being court martialed once before.

Q And, did you check his record?

A I think I did.

Q And, it showed that he had been court martialed, how many times?

A I think he had been court martialed twice.

Q And, at the time of this investigation he had just been released from serving time on one of those, had he not?

A That is correct, sir.

Q Now, you learned in this investigation that Parker went AWOL immediately after the shooting, is that correct, Mr. Urdinarrain?

A Yes, sir.

Q He did. You also learned in this investigation that Private Parker was in a conference with the same Italian thieves whose statements you took immediately after the shooting in a cafe downtown, is that correct?

A Correct, sir.

Q The Italian witnesses whose statements you have, hid Parker from the military police, is that correct?

A Correct, sir.

Q And, they aided him to escape, is that correct?

A Yes, sir.

Q They got a taxi for him, is that right?

A That's right.

Q And, Parker was not seen nor heard from for how long after?

A Parker was several days—Parker was picked up; I believe, the same night he was picked up.

Q Now, will you check your records?

A I have no record of that.

Q Actually, he was AWOL for eleven days. Would you dispute that statement?

A I don't think so.

Q And, where was he apprehended?

A I think he was apprehended in Pisa.

Q You don't have your records to show that?
A No, sir.
Q Would you dispute the fact that he was apprehended in Trieste?
A I don't recall, sir.
Q Do you know the distance from Pisa to Trieste?
A Yes, sir.
Q About how far is it?
A I'd say about three hundred miles.
Q Did another person go AWOL with Parker at the same time?
A I believe he had another soldier who went AWOL with him. I don't recall his name.
Q Now, didn't you learn also on investigation that Parker stated he had had many deals with Franco?
A Yes, sir.
Q And, didn't Parker tell you that he had invited the thieves to the compound that night?
A Yes, sir.
Q And, didn't Parker tell you that he was the one who arranged the signal of "Angelina."?
A Yes, sir.
Q And, didn't he tell you that he had used that "Angelina" signal on all his previous deals with him?
A Yes, sir.
Q And, did you learn by your investigation that Parker had eleven million lira on deposit in Leghorn?
A We checked that.
Q And, you found it so?
A Not under his name.
Q Under whose name did he have it?
A It was some woman's name.
Q But, you found it belonged to him?
A That couldn't be proven.
Q Did Parker say it was his?
A No, sir.
Q What did the woman say?
A She said it was hers.

Q Now, when Parker went AWOL, I think there was a Private Hoy went AWOL also.

A That's correct, sir.

Q And, these Italian witnesses whom you interviewed told you on occasions where they paid Hoy 80,000 Lira to come into the Depot, is that correct?

A Yes, sir.

Q And, they had let them in the Depot, is that right?

A Yes, sir.

Q And, these witnesses told you that they came out to the Depot at the invitation of Bobby and Parker, is that right?

A Yes, sir.

Q And, that they had been in the Depot that night and had been routed when the OD came, is that correct?

A Yes, sir.

Q Now, did you investigate Private Hoy's deposits in Leghorn?

A Yes, sir.

Q Did you find it to be something like 8,000,000 Lira?

A No, sir.

Q What was it?

A We didn't find any money on Hoy.

Q How about on deposit?

A On deposit, none.

Q Did you check his money orders he sent home?

A No, sir, that couldn't be done at that time.

Q Now, I want to ask you if you investigated Gusik's deposits in Leghorn.

A Yes, sir.

Q What did you find?

A We didn't find anything on Gusik's deposits in large amounts.

Q In what amounts?

A In no large amount.

Q Were there any small amounts?

A I don't recall whether there was one for three or four dollars, something like that.

Q Three or four dollars? That was the total amount of his deposits?

A I am not sure.

Q Did you check his money orders?

A Yes, sir.

Q And, how much had he sent home in money orders?

A We couldn't get all the money orders. At that time they had just stopped that, and we found between Gusik, Parker and Hoy — I think we must have found —

Q Now, just a second. Don't tell me Parker, Gusik and Hoy. What did you find in money orders of Gusik's?

A As I said before, I don't recall, but I think there was one for two or three dollars.

Q Just a minute ago you told me you couldn't check money orders. Now, you want to tell me the money orders of Parker and Hoy.

A A week before that they had stopped because the APO was checking on money orders and they had collected all these stubs and was sending them to Rome. When we got there they had just a few of the last bunch there.

Q And, you found some for Parker?

A As I said before, between the three of them we found three or four stubs. That is all we were able to find.

Q How much money did Gusik have on his person when he was arrested?

A I don't recall off-hand how much money he had.

Q Now, you were very interested in running down these thefts, is that right?

A Yes, sir.

Q Larceny was the big thing at the Depot?

A Yes, sir.

Q Millions of dollars stolen?

A Yes, sir.

Q Here, Parker had confessed, is that right?

A Parker, yes, sir.

Q To several deals?

A Yes, sir.

Q Several Italian witnesses gave you statements of their dealings with Parker?

A Yes, sir.

Q They told you that Parker was known as the G. I. Black Marketeer, is that right?

A Yes, sir.

Q Was Parker ever court martialed for black marketing?

COL. CHAPMAN: I object to that as incompetent, irrelevant and immaterial.

MR. DIRENFELD: Now, if Your Honor please, we are showing a design here which will unfold, if the Court will bear with us.

THE COURT: What does that have to do with the case, whether he had been or had not been court martialed?

MR. DIRENFELD: It will unfold within the next very few questions.

THE COURT: He will be permitted to answer.

A Yes, sir.

Q Now, wasn't he court martialed for being AWOL?

A No, sir.

Q And, he was tried before a general, special or summary court martial?

A Special.

Q And, the maximum penalty that a special court martial can assess is—?

A Six months.

Q And, the date of that court martial was—?

A I don't recall the date of the court martial.

Q Wasn't it the very morning of the date on which the Gusik court martial was held?

A I don't recall. I don't recall exactly what date the court martials were.

Q Was Parker brought in to testify against Gusik under guard?

A I don't recall whether he was brought in under guard.

Q But, he was then a prisoner, is that right?

A Yes, sir.

Q Now, wasn't Parker's sentence suspended shortly after the Gusik trial?

A That I do not know, sir.

Q None of your records show that?

A No, sir, our records are complete once the case goes to the SJA.

Q You talked to Parker how many times?

A I talked to Parker several times; I don't recall just how many times I talked to him.

Q Now, during the time that Gusik was being held at the Disciplinary Training Center, I believe he was placed in some lineups for identification, is that correct?

A Yes, sir.

Q You testified yesterday, I think, to that?

A Yes, sir.

Q Was he ever identified by anyone as a black market thief?

A—No, sir.

Q You had Parker in the lineups several times. Was he ever picked out as a black market thief?

A Yes, sir.

Q Was Hoy picked out as a black market thief?

A Yes, sir.

Q How many times had he been in the lineups?

A I don't recall how many times we had Gusik on the lineup.

Q And, not a single person identified him as a black market thief?

COL. CHAPMAN: He has already answered that three times, if Your Honor please.

THE COURT: Are you objecting?

COL. CHAPMAN: I do, sir. It has already been answered.

THE COURT: Sustained.

Q Now, how many times was he in the lineup?

A I don't recall how many times he was in the lineup?

Q Now, of all the witnesses you interviewed, did any one of them tell you that they paid any money whatsoever to Gusik?

A No, sir.

Q And, Gusik was being held though you had no statements that he received any money; you had no statements that he was identified as being a black marketeer; no deposits; he had given you statements telling you how he had refused entrance; and he was being held, is that correct?

A Held for investigation, yes, sir.

Q Held for investigation of what?

A Held for investigation of CID.

Q For what offense?

A No offense.

COL. WINDOM: If counsel has exhausted the Parker matter we would like to renew our previous objection. The matter hasn't been tied up, unless I am awfully dense.

MR. DIRENFELD: It has been tied up.

COL. WINDOM: Do you mind clarifying it for me so I can understand what you are driving at?

MR. DIRENFELD: The fact that he was brought to court martial the day after his records —

THE COURT: Now, just a moment, you don't have to educate Col Windom. It is your duty to proceed with the trial. Col. Windom can object if he wants to.

COL. WINDOM: We have objected, sir.

THE COURT: Over-ruled.

Q Now, you stated the first time you talked to him was about three hours in the morning of the day of his arrest on September 3, is that right?

A That's right, sir.

Q Then he was sent back. Several days later he was brought to CID office?

A Yes, sir.

Q Who was present?

A I don't recall who was present, sir.

Q Were you alone?

A No, I won't say I was alone. Most of the time there were Italian police in the office.

Q Now, these Italian police who were there, were there for what purpose?

A They worked out of the same office. They were interrogating civilians.

Q I want to ask you, Mr. Urdinarrain, during the time this occurred, isn't it a matter of fact the Italian newspapers were carrying headlines demanding that the imperialistic army be ousted, or that someone be convicted to pay for the slaughtering of two citizens, or words to that effect?

COL. CHAPMAN: I object to that as being incompetent, irrelevant and immaterial.

THE COURT: Sustained.

At this time the Court intends to take a brief recess.

(Thereupon, a short recess was taken.)

Q Now, the job of Italian police was to prepare cases against the Italian civilians, as I understand it, is that right?

A They would question Italian civilians and take

their statements. We, in turn, would take that statement and have it translated.

Q Now, Mr. Urdinarrain, when you took the statement of an Italian thief who confessed to his thievery, I think, in some instances the stolen goods was even recovered, is that right?

A Yes, sir.

Q And, when the statements were taken, copy was given to the Italian police also, is that correct?

A They kept their own file copy, yes, sir.

Q Now, did you learn from your investigation what the Italian Government or Courts did to these confessed thieves in the way of punishment?

COL. CHAPMAN: That is objected to as incompetent, irrelevant and immaterial.

THE COURT: Yes, what do you claim for this?

MR. DIRENFELD: Your Honor, in line with the same view, we will show that there was absolutely nothing done in the case of these thieves. We are going to show that the thieves in this case, confessed thieves, were all left out and rounded up together for witnesses against one man.

COL. CHAPMAN: Now, if the Court please, what the Italian civilian authorities may or may not have done with their own Italian nationals certainly has no bearing on what the Army may have done to the personnel subject to military jurisdiction, even if it were true, assuming for arguendo it is true, there is nothing that the U. S. Army could do. That was entirely up to the Italian Government, and I submit that it has no bearing on this matter and it is entirely irrelevant.

MR. DIRENFELD: If it please the Court, the Colonel says innuendo.

COL. CHAPMAN: I said arguendo.

MR. DIRENFELD: —or arguendo. We submit that if nothing was done to these Italian thieves in the way of punishment, then the position of the Italian police being there is inconsistent with the statements of the

witness at present that they were there for the purpose of building a case against Italian thieves.

THE COURT: He may answer. Over-ruled. Read the question.

COL. CHAPMAN: With respect to that, may I say this to clarify it in the Court's mind. Under the military justice procedures existing at that time there was no requirement, and there are civil circuit court decisions to that eeffct, principally Romero v. Squier in the 9th circuit — I have the citation but not offhand — in which it has been held, and it has always been part of the military justice system, that persons suspected of implication in crimes up to the time that they are actually tried are not under any of the articles of war, and under military justice procedures are not entitled to counsel. Romero v. Squier.

THE COURT: Of course, the Court is not referring to the preliminary investigation. The Court is referring to the actual trial of the case.

COL. CHAPMAN: In the actual trial of the case, of course, he is entitled to counsel under the articles of war.

THE COURT: Well, it might have some bearing on the question of the reputation which he had at the trial. In other words, if this was available to counsel it might have been pertinent during the trial for him to have brought it out. Now, the Court doesn't know; the Court hasn't read the record. The Court doesn't know whether this man who went AWOL was one of the principal witnesses against this petitioner or not. Did he testify at the trial?

MR. DIRENFELD: Yes, he was the chief witness.

THE COURT: Might it not go to his credibility?

COL. CHAPMAN: It might go to his credibility.

THE COURT: This Court is not here—

COL. CHAPMAN: This is immaterial to these issues.

THE COURT: This Court is not concerned with the guilt or innocence of this defendant. This Court

is concerned with the question of whether or not he had a fair trial; that is, under the due process clause, if it is applicable to this case.

COL. CHAPMAN: If it is, I frankly cannot see the materiality.

THE COURT: Well, there may be great doubt in the mind of the Court as to whether it agrees with your position.

COL. CHAPMAN: Your Honor is entitled to your own thoughts. It is going so far afield that we could go on for several days.

THE COURT: I think perhaps during the course of the trial we have been afield. At the beginning of the trial the Court told you it would act without a jury; that in a case of this character the Court would hear the entire story as long as you did not go too far afield. This Court is not here to determine whether or not this Petitioner is guilty or innocent.

MR. DIRENFELD: I only wish to add that this man Parker was not cross examined whatsoever.

THE COURT: Well, you can bring all that out at the proper time in your brief.

The military tribunal is a creature of the statutes, within its own sphere, of course. This Court cannot reach down and retry this man. You understand that.

MR. DIRENFELD: I appreciate that, sir. Will you read the question, please.

(Reporter reading):

"Question. Now, did you learn from your investigation what the Italian Government or Courts did to these confessed thieves in the way of punishment?")

A Yes, sir.

Q And, what was their punishment?

A Only one man was tried, Lorrol.

Q Now, Mr. Urdinarrain, will you refer to your report again. I think you will find that in your report you stated none of the Italians were tried; they were all reprimanded. Do you recollect that?

A As of the time the report was made.

Q Now, from your own knowledge, Mr. Urdinarrain, were there a lot of thefts going on by Italian civilians?

A Yes, sir.

Q From your own knowledge, do you know whether or not these thieves carried weapons very often?

A Very seldom they carried weapons.

Q From your own knowledge, do you know of cases where the thieves fired upon American guards?

A On one incident only, sir.

Q On one incident only?

A That's right.

Q You are certain?

A Yes, sir, I know of one incident.

Q Now, those incidents are all reported to CID?

A All of CID record.

Q What I mean, if there is such an incident it would be reported to CID?

A Yes, sir.

Q Were there not passes and furloughs offered to American guards for the capture of Italian thieves?

A Not that I know, sir.

Q Not to your knowledge whatsoever?

A No, sir.

Q No American soldier ever told you that, and you never saw an order to that effect?

A No, sir.

Q Do you know, by reason of your investigation, what Gusik's past military record was prior to this incident?

A I think he had a clean record all the way through.

Q What do you mean by clean record?

A I don't recall off-hand even though I did look at his record; I don't recall. I don't think he had a previous court martial.

Q Did he have any sort of punishment shown on his record?

A No, sir, I don't think so.

Q Did you talk to his Commanding Officer?

A Yes, sir.

Q Did you learn from your investigation that Gusik had captured Italian thieves at the gate on at least two other incidents prior to that?

A I had heard of that, sir, but not from his Commanding Officer.

Q Who did you hear it from?

A I think Sergeant Tuck.

Q Sergeant Tuck was in the same outfit with Gusik?

A They were in the same Depot. They were in Port Security—rather, Depot Security.

Q And these captures involved the use of fire-arms?

A I don't recall, sir.

Q Are you familiar with raiding parties that went on?

A On several, but not at the Depot where Gusik was stationed.

Q In other words—now, let's make it clear to the Court and the record what we mean by a raiding party, where a group of American guards are sent into the woods outside the Depot armed to dig out and seek thieves who are in ambush there. Now, is it your statement that there were no such raid parties from the Depot that Gusik was in?

COL. CHAPMAN: I object, if the Court please.

THE COURT: What connection does that have with the case?

MR. DIRENFELD: Once again, to show the atmosphere.

THE COURT: They might be raiding for different purposes.

COL. CHAPMAN: I further object to the form of the question in that counsel has just defined raiding parties. I don't know whether that is the proper definition.

THE COURT: Objection sustained.

Q Now, during this time that you learned all these things that you just testified to, you were still holding Gusik in DTC, is that correct?

A Yes, sir.

Q And, after September 3, the date of his arrest, when next did you talk to him?

A Several days after September 3.

Q Several days later?

A Yes, sir.

Q And, that was also at the CID office, and that is the day you went down and got him?

A I know I went down and got him several times; how many times I went down—

Q And, what time was that?

A Sometime in the morning I arrived at DTC; about eight o'clock.

Q And how long did you question him?

A About an hour or two hours.

Q Now, did you ask him for a statement that day?

A I don't recall if I asked him for a statement that day. I know I questioned him.

Q Didn't you ask him to put his statement in writing?

A No, sir.

Q You didn't take it on that occasion?

A No, sir.

Q Now, after these two or three hours of questioning, what then was done with Gusik?

A Well, in the meantime Whitmire was working on the larcenies at the Depot and he would have other people he'd been questioning at the same time the Italians were questioning the civilians. Now, when I say an hour or two hours, it wasn't that I continually questioned an hour or two hours.

Q In other words, you were going in and out of the room, is that the impression you want to convey?

A Yes, sir, and then Gusik would wait.

Q And Gusik was left alone in the room?

A There was always an agent in the room.

Q In other words, there was always someone standing guard.

A Not guard, no, sir.

Q Well, who stayed with him?

A Some other agent in the office.

Q Now, are the other agents authorized to interrogate witnesses?

A No, sir, they can interrogate but they are not authorized to.

Q Do they?

A Not in this case, I don't think they done it.

Q You had other agents working on this case with you?

A Just one more agent.

Q Just one agent?

A One agent.

Q And, when you would walk out of the room you would leave an agent in the room with Gusik?

A Whitmire or the Italian police would be there.

Q Now, are you trying to convey the thought that Whitmire did not question him when you walked out?

A Well, when I walked out I don't know whether he questioned him or not.

Q Did Whitmire tell you he did?

A No, he never told me.

Q And, then when you would come back you would resume questioning; is that right?

A Yes, sir.

Q And then you would go out again and Whitmire would be left with him?

A Whitmire or someone else.

Q Now, after you picked him up about eight o'clock and interrogated him for two or three hours, it was close to lunch time. What happened then?

A He was taken back to DTC.

Q Taken back to DTC?

A Yes, sir, or if not we would feed him in the office.

Q Just a second. I am talking now about the oc-

casion of his second visit to the CID office. That is the morning you had him there for two or three hours. Now you are at noon time. He is taken back to DTC that day, or not?

A I don't recall whether he was taken back at noon time. I don't know what time it was, but if we weren't through with him we would feed him in the office.

Q What did you feed him in the office?

A Issue K rations and C rations.

Q What does a K ration consist of?

A It is a box and they have a box for breakfast, lunch and supper and they got cheese, canned meat and biscuits, cigarettes.

Q No, actually there is no canned meat in C, is that right?

A Well, they have this egg spread, I believe.

Q There is a little can of some food; there is a couple of little biscuits, is that right?

A Biscuits, that's right.

Q And, then some cigarettes?

A Yes, sir.

Q That was his lunch. When did you finish questioning him that afternoon.

A The most we have had him there, maybe three hours and then he would go back.

Q How are you so certain that the most you had him was three hours at any time?

A Because at that time I wasn't just carrying Gusik's case and the larceny case. I was carrying approximately 25 cases and I wasn't just working on Gusik's case.

Q Well, Mr. Urdinarrain, your records, your blotter, as you call it, would show the time you spent with Gusik, won't it?

A Yes, sir.

Q Didn't you deem that important to bring with you?

A Those Leghorn records—we were working out of free territory over there and I believe most of those records were sent to Austria or Germany.

Q Did you make inquiry about them?

A No, sir, I didn't.

Q Now, when next did you talk to Gusik?

A I don't recall, but I think it was on the day of the statement. The day I took the statement in writing.

Q Now, let's see if I got this straight. The first time you talked to him was the date he was arrested, September 3.

A That is the first time I talked to him in the CID office?

Q In the CID office. The next time you talked to him was several days later for two or three hours, and the third time you talked to him was the date that you say you took a written statement?

A I am not sure. He might have been down to the office before that; maybe another time, maybe twice, but I don't recall that.

Q If I told you that Gusik stated he was down there about five times would you dispute that statement?

A No, sir.

Q It is very possible?

A Yes, sir.

Q If I told you that Gusik stated that he was there at a five-hour stretch, would you dispute that?

A No, sir.

Q If I told you that he was there in a five-hour shift in the morning and a five-hour shift on the same afternoon, would you dispute that?

A Yes, sir.

Q What would you say?

A I would say most likely he was there in the morning but not in the afternoon.

Q Now, on these occasions he was brought in, are you attempting to convey the thought here now that he was never asked for a statement before September 15?

A I have asked him for statement, yes, sir.

Q You have asked him for a statement?

A Yes, sir.

Q Did he give you a statement prior to September 15?

A No, sir, he didn't give me no statement prior to September 15.

Q Did he state why?

A No, I didn't ask him; I didn't exactly want to make a statement out, I wanted to wait until the completion of the whole thing and then get the statement.

Q Well, then, I am asking you again, is it the thought that you are trying to convey here that you did not ask for a statement from Gusik at any time — I am talking about a written statement — prior to September 15?

A No, sir.

Q You did not?

A No, sir.

Q Is that what I can take your answer to be?

A I knew Gusik would give me a statement.

Q You knew that?

A Yes, sir.

Q Were you attempting to hold him there to get the type of statement you wanted, was that your idea?

A No, sir, I just wanted to round up the other two fellows in the homicide.

Q Now, what did you discuss each of these times that he came up, if you were not asking for a statement?

A The larcenies, the people involved in the larcenies; who were they; about Parker, Hoy and Gusik; and about the Italian civilians, who he knew and who he didn't know up there. All the time he came up there we were talking about the larcenies.

Q Now, you told me a little bit earlier that you had asked Gusik if he had previous dealings with any black marketeers and he told you no, is that right?

A That's right.

Q And, he repeatedly told you no on each interrogation, is that correct?

A Yes, sir.

Q Now, will you tell the Court what brought about the change in statement on September 15?

A Gusik—he was always sticking to his own story, that he had nothing to do with these deals and larceny cases. Finally, when we got Parker's and Hoy's statement, I think that was the first time that he stated that he had talked to these civilians about getting into the Depot, but that at the last minute he had changed his mind and told them they couldn't come in. I think maybe the following day, that was the 15th — I am not correctly sure on the day that we had the statement in writing.

Q Now, Mr. Urdinarrain, did Private Parker tell you that he saw or heard or knew of Gusik being in black market deals?

A Yes, sir.

Q He told you that?

A Yes, sir.

Q And, did Private Hoy tell you that?

A I think he did; I am not sure, but I know Parker did.

Q Incidentally, by your investigation did you ever learn who it was that came up and slipped a note to the Italian Parker was talking to in the cafe immediately after the shooting?

A No, sir.

Q Do you know the contents of that note?

A I don't recall the contents of it. I think I got it in the report about the note that was passed in the bar at Tirrenia.

Q I will ask you, did the note state that this particular party was just as guilty of murder as anyone else and that here is a lawyer to get? Was that about the essence of that note?

A It was something about if you don't get a lawyer —something about contacting a lawyer because the party is as guilty as the rest of them; something to that effect.

Q Now, during your investigation you stated you learned that Parker went AWOL immediately. Did you learn in your investigation where Gusik was after the shooting?

A I think Gusik was at the Depot.

Q Did he remain there?

A I believe he did.

Q Pardon?

A Yes, sir, I think he did.

Q Now, he was arrested on September 3 and on September 15 you took the statement?

A Yes, sir.

Q With possibly several interviews in between?

A Yes, sir.

Q You stated yesterday that in your CID school you studied and learned Articles of War, is that right?

A Yes, sir.

Q Did you ever study Article of War 70?

A I just don't recall off-hand. It is one article we don't use much.

Q You don't use much?

A No.

Q Do you know that Article of War 70 provides that a fair, thorough and impartial pre-trial investigation must be performed by the investigating officer?

COL. CHAPMAN: Now, if the Court please, I respectfully object to the form of that question in that it is either intentionally or unintentionally misleading, because of the fact that the Article of War 70 refers to the investigating officer appointed by the appointing authority to investigate the charges after they have been served upon the accused. It has no bearing whatsoever on the preliminary investigation made by the CID.

THE COURT: Over-ruled. He may answer.

A I was not the investigating officer.

Q Did you know that that's what Article of War 70 provides?

A Yes, sir, that's what I meant when I said we don't use that very much.

Q I am going to ask you whether or not you knew whether, under Article of War 70, there was a provision that when a person is held for trial by general court martial the Commanding Officer will, within eight days after the accused is arrested or confined, if practicable forward the charge to the officer exercising general court martial jurisdiction? Were you aware of that eight-day limitation?

A Yes, sir.

Q From the 3rd of September to the 15th of September was twelve days. Were there any charges brought during that time?

A No, sir.

Q Were you familiar with the Articles of War that provided that a person arrested must be charged or released.

A Yes, I was authorized to that.

Q Authorized to what?

A To keep him there after the eight days.

Q Without charges?

A Without charges.

Q Who authorized you.

A That came from the Commander.

Q What Commander?

A In Leghorn.

Q Who signed the order?

A I believe it was the Staff Judge Advocate.

Q What was the name of the Staff Judge Advocate?

A I don't recall his name.

COL. CHAPMAN: Colonel Thomas A. Barratt.

Q Let the record show Col. Thomas Barratt gave you permission to hold him eight days without charges.

A He didn't give me permission. Before the eight days was up I had gone to the Chief of the CID and told him that the man had to be released. They got in touch with the Command and it was approved.

Q When you say "the Command" you are referring to the TJA and the Commanding Officer of Port Leghorn?

COL. CHAPMAN: Staff J. A.

Q Staff J. A. and Commander of Port of Leghorn?

A That's right, sir.

Q Is that what you mean, Mr. Urdinarrain, when you said "We don't use AW 70 very much"?

A That's for the investigating officer after the CID investigation is completed.

Q How about the eight-day limitation?

A We go by the eight-day limitation, providing they give us the authority to go over the eight days.

Q Do you know when charges were preferred against Thomas Gusik?

A No, sir, once our case is completed and goes to the SJA we don't hear any more about it unless we are called as a witness.

Q Now, Gusik was arrested on September 3. He was there until the 15th of September. You have talked to him several times; he's denied you accusations. Tell us what happened on the 15th of September when he came in the office.

A On the 15th of September, if I recall, I read some of Parker's and Hoy's statements to him and Hoagland and some of the other boys, and I asked him for a statement.

Q Yes, go on.

A We talked about the homicide and larcenies and everything, and then finally he gave me the statement; I wrote it down and it was typed. He read it again after it was typed.

Q Now, all you did was read Hoy and Parker's statements, and then Gusik said, "Well, these things what he said in the statements are true."?

A I don't recall just how many statements I read to him or what we talked about. I know it was in regard

to the larcenies and the homicide, but on the 15th of September I did obtain a statement from Gusik.

Q Let's see, I think you testified yesterday that you went down and got him about 7:30 or eight o'clock in the morning, is that right?

A No, sir, not that early.

Q What time was it?

A I'd say I arrived at the DTC maybe nine o'clock, maybe nine-thirty, at the earliest.

Q Now, this particular day, September 15?

A I don't recall what time I got to the DTC.

Q But, to the best of your recollection it was in the morning?

A It was in the morning, yes, sir.

Q What time was he returned to the DTC that day?

A I think it was sometime in the evening.

Q About what time?

A I don't recall, I think it was before five o'clock. I know it was in time for him to get his meal.

Q You'd say he was there about seven hours, from ten to five?

A Yes, sir.

Q Did he have his K ration that day?

A Yes, sir, I believe he did.

Q Now, after you read that statement—those two statements to him—

A I didn't say it was two; maybe two, three or four.

Q You read the statements in your file?

A Yes, sir.

Q What took seven hours to get this statement?

A I don't recall just what took long. I know we had a lot of other work to do. We had him wait in the office while we questioned other people, but he wasn't questioned for seven hours or three hours or two hours continually at no time during the course of the whole investigation.

Q I see. Now, on this particular day of September 15 did you walk out of the room at any time?

A Yes, sir.

Q Left another agent there?

A Yes, sir.

Q And, then, you would come back and resume questioning?

A Yes, sir.

Q And, when you left again the other agent would be there?

A There would be always someone on the office. Maybe an hour would go without anyone questioning him at all.

Q You don't know whether the other agent was interrogating him in your absence, do you?

A No, sir.

Q Now, this statement that was taken you claim as Gusik's own statement exactly as he told it to you?

A Yes, sir.

Q Just one second, if you will. Who wrote this down as he gave it?

A I did, sir.

Q Pardon?

A I did, sir.

Q Now, tell us what happened. Did Gusik just speak this out?

A No, No, I would question him on certain things and I would make notes, and then when I was all finished we would start all over then and I would write something and I would read it off to him. If he wanted it that way all right, and if he wanted it changed we would change it.

Q In other words, you were doing the writing. This wasn't exactly as he dictated it to you, was it?

A No, sir.

Q So, you wrote this from your own notes, is that right?

A That's right.

Q And you would show it to him. Did he object to anything you wrote?

A I know he objected to a few things, but I don't recall just what they were. Many of my statements that I have taken—there hasn't been once that people haven't refused one thing or another. It is pretty hard to recall.

Q And, you would then rewrite parts he refused?

A No, sir.

Q But you do remember he made some refusals?

A Yes, sir, I do.

Q All right, now, after you wrote it out and he made a refusal what was done then?

A I was writing in pencil. I would just scratch it out.

Q And then what?

A We would continue with the statement. When we were all finished, all the notes I'd made, I'd write it out the way it is written in that statement and I'd read it off to him.

Q Now, Mr. Urdinarrain, you didn't argue with him at any time, or say that it's not to say that?

A I never argued with Gusik on that statement.

Q You never told him that it must have been that way?

A Oh, no, sir. He was present like now, and at no time did I have any arguments with Gusik about his statement.

Q Answer the question. Did you ever tell him it must have been that way?

A No, sir.

Q Never did. Did you ever refuse to delete any of the parts he objected to?

A No, sir.

Q Now, I am going to ask you whether or not Gusik said to you, "I'm positive that the shots fired from my gun killed the two Italians"?

A Gusik told me that.

Q Gusik said he is positive that the two shots from his gun killed these two men?

A I don't recall just everything that is in the statement, but if it is in that statement Gusik told me just that.

Q In those exact words?

A Approximately not those exact words; I don't recall, but something to that effect.

Q Now, Mr. Urdinarrain, as a practical matter, you have just described the circumstances. It was three o'clock in the morning; you had talked to everyone the night of the shooting; four people firing, firing from the inside; different sides witness firing outside; you had talked to the Doctor in between and had these different sized bullets. You know that that is not Gusik's statement, is it?

A That is—

COL. CHAPMAN: I object. That is argumentative, if the Court please.

THE COURT: Sustained.

Q Let me ask you this. From your own knowledge don't you know that to be false?

A No, sir, Gusik was making that statement.

Q That is the question. The question, Mr. Urdinarrain, is, from your own knowledge of the four different people firing at night and no ballistics test, don't you know that to be false?

A No, sir.

Q Do you believe it to be true?

COL. CHAPMAN: I object as incompetent, irrelevant and immaterial.

THE COURT: He has already answered. Sustained.

Q Now, in that statement it says that Gusik had dealings with Franco, is that right?

A Yes, sir.

Q I want to ask you, do you recall a conversation with Gusik wherein you asked him if he ever saw Franco?

A I might have asked him that question, yes, sir.

Q Do you remember the conversation where you asked him if he knew who Franco was?

A I might have asked him that one.

Q Do you remember Gusik's reply that Franco was employed on the Depot?

A Yes, sir, I do recall that, sir.

Q Do you recall Gusik telling you that he saw him on one occasion inside the Depot while he was on guard duty?

A Yes, sir.

Q And, you asked him why he didn't chase Franco on out, didn't you?

A That I don't recall, if I asked him that.

Q Let me ask you this. Do you remember Gusik telling you that the reason he didn't chase him out on that one occasion when he saw him was because he was an employee, properly on the Depot, do you remember a conversation like that?

A I remember something to the effect that he had seen Franco in the Depot and that he believed he was employed by the Depot.

Q Now, didn't your investigation show he was so employed?

A At that time he had been fired in the Depot.

Q How much prior thereto?

A He had been fired about a month before the shooting.

Q About a month before the shooting, and when Gusik told you he had seen him on a prior occasion, wasn't that a month before that he had seen him?

A Yes, sir.

Q So, at the time he said he saw him he was an employee?

A Yes, he was an employee at the time Gusik saw him.

Q Now, do you remember telling him that if he saw Franco in the compound he must have had a deal with him?

A I don't recall telling him that.

Q You don't recall that, but you remember the other part of the conversation?

A I remember the part, Gusik telling me Franco being an employee of the Depot.

Q Did he tell you how he came to go to town on the afternoon of the 12th?

A I don't recall exactly. He got a pass, I believe. He was with another soldier, I don't recall his name and they went to town and met up with a civilian, that he was under the impression knew this man Franco, and that he walked up to him to tell Franco to come over to his post, that he would be on duty that night.

Q Excuse me one second. Now, I am asking you what Gusik told you.

A That is what he told me.

Q Didn't he tell you that Parker had asked him to take a message? Did he tell you that?

A I don't recall if he did.

Q You don't recall?

A No, sir.

Q You didn't discuss anything about Parker?

A We discussed Parker and everyone involved in the case every time we met, every time I spoke. What exact words was said I don't recall.

Q Would you dispute the fact—Strike that. If I told you that Gusik had stated that he told you Parker had sent the message, would you dispute that?

A I don't recall that.

Q. But, you wouldn't dispute it, would you?

A No, sir.

Q And, you also, had the statements from Parker that he invited them in?

A Yes, sir.

THE COURT: How long will it take you to conclude your cross examination?

MR. DIRENFELD: Not very long; just a few minutes.

THE COURT: This clock is not right. It is ten

minutes slow. The Court has no desire to hurry you. It intends to take a recess until two o'clock.

(And thereupon a recess was taken until two o'clock of the same day.)

Thursday Afternoon Session
September 9, 1948

R. P. Urdinarrain,

resuming the stand for further cross examination, testified as follows:

CROSS EXAMINATION

By Mr. Direnfield:

Q Now, Mr. Urdinarrain, on September 15, the date on which you took the statement, didn't Gusik tell you that Italian guards had also fired at the same time he did?

A I don't recall them telling me that, sir.

Q Didn't he tell you other American soldiers fired at the same time?

A No, sir.

Q Did you ask him whether or not anyone else had fired, in view of what you had learned, that they had?

A Yes, sir.

Q Pardon?

A Yes, sir.

Q And, what was his answer?

A That the other guard also had fired and that he had heard some Italian guards fire.

Q Now, can you tell this Court why that was not included in his statement?

A He didn't put that in his statement.

Q But, Mr. Urdinarrain, you wrote the statement, did you not?

A I wrote just what he was telling me.

Q Didn't he just tell you that these other guards fired?

A Not that they fired at the same time, that he was the first one to fire.

Q And, did he tell you that these others also fired? You stated that he did, is that correct?

A Yes, sir.

Q Was there any particular reason why you omitted that from the statement?

A I didn't omit. Everything I wrote down was read to him afterwards and he agreed the way it is in the statement.

Q But, that was not included?

A No, sir.

Q Now, during the time, those seven hours on September 15, did you read the 92nd Article of War to him?

A I don't recall, sir.

Q Do you know what the 92nd Article of War is?

A No, sir, I don't recall that either.

Q Did you at any time tell him what the maximum penalty for murder is?

A I don't recall, sir.

Q Do you remember telling him that the rope is the maximum penalty for murder?

A I never told him that, sir.

Q You never told him that?

A No, sir.

Q Did you tell him that if he signs this statement you will see that it goes easier with him?

A No, sir.

Q Now, during these seven hours, there was just writing down the statement, striking parts out, rewriting and rephrasing. Is that how the seven hours was spent?

A No, sir, the seven hours were not spent in that.

Q Well, now, what were the seven hours spent doing?

A I was busy with other witnesses, and many a time, maybe for a period of a half hour I didn't speak to Gusik.

Q Mr. Urdinarrain, how long did it take you while you were writing this statement and striking parts and reading it back and having it typed?

A I'd say that took about an hour.

Q About an hour?

A About an hour.

Q About how many strike outs would you say you had on that statement?

A Oh, maybe two or three, I'd say.

Q Do you have the original hand written copy?

A No, sir.

Q Where is that?

A That is back in the Leghorn file, I think. I am not sure about that.

Q Do you know a Lieutenant Ryan?

A No, sir.

Q You never heard of him — Radar Ryan?

A No, sir.

Q Did Gusik tell you that he wanted to be represented by Lieutenant Ryan?

A I don't recall Gusik telling me he wanted to be represented by Lieutenant Ryan.

Q If I told you that Gusik so stated, would you dispute that statement?

A Yes, sir, he did not?

Q Who did he ask for counsel, if anyone?

A I don't recall Gusik asking for any counsel, any particular counsel?

Q Did he ask for counsel?

A I don't recall that.

Q Did anyone ask for counsel for him?

A Not that I know, sir.

Q Now, during this seven hours you didn't talk rope; you didn't tell him the maximum penalty; you didn't tell him what was going to happen to him, did you?

A No, sir.

Q And, during those seven hours you never laid a hand on him, did you?

A No, sir.

Q Nor, did you see anyone else lay a hand on him, did you?

A No, sir.

Q Now, it is your contention that this is his voluntary statement and he signed it without objection?

A Yes, sir.

Q That is your contention?

A Yes, sir.

Q About what time did the signing take place?

A I don't recall. I have to look it up on the statement; I don't recall the exact time.

Q Do you remember what part of the day?

A That was in the afternoon.

Q At your CID school were you instructed in jujitsu?

A No, sir.

Q Were you taught police holds?

A Yes, sir.

Q Did you ever have occasion to use them?

A Yes, sir.

Q Now, Mr. Urdinarrain, do you know Lieutenant Burks?

A Yes, sir.

Q Do you know where he is now?

A I am not sure, but I believe he is in Italy.

Q Have you seen him lately?

A No, sir.

Q When is the last time you saw him?

A I think the last time I saw him was several days, or maybe a week or two after the Gusik case. That's the last time I saw him.

Q Do you know whether he is in Naples, Italy, right now?

A No, sir.

Q Do you know whether or not he is in business there?

A No, sir, I don't know.

Q Do you know whether he is married there?

A That I don't know, sir.

Q Do you know whether he is still in the army?

A No, sir, he's not in the army.

MR. DIRENFELD: That is all.

THE COURT: Do you desire to question the witness?

COL. CHAPMAN: Yes, sir, I do.

REDIRECT EXAMINATION

By Colonel Chapman:

Q You were asked whether or not the CID had originally determined that in their opinion this homicide was a justifiable homicide, and your answer was yes. Do you know whether or not that opinion was subsequently changed?

A Yes, sir.

Q And, for what reason?

A We changed it on the testimony and statements of the Italian civilians that were picked up later.

Q What was the approximate date, with respect to the time of the incident in question, when the CID original opinion was rendered?

A I'd say several weeks.

Q The original opinion?

A Under the impression that it was justifiable?

Q Yes.

A I'd say maybe four or five days after the incident.

Q At that time had any extensive investigation, either concerning the incident of homicide or the black market activities or larcenies, been conducted by the CID, to your knowledge?

A Very small part. Most of the questions were in regard to the larcenies; very little regarding the homicide.

Q And, subsequent to this first opinion was a more extensive investigation conducted by yourself and other agents of the CID?

A Yes, sir.

Q Approximately, if you know, how many additional witnesses after that time were interrogated by you and other agents?

A In the larceny case I'd say approximately fifty to sixty witnesses were interrogated.

Q Subsequent to the original opinion of CID, is that right?

A Yes, sir.

Q So that after the investigation had been completed the CID arrived at a different opinion, is that so?

A Yes, sir.

Q Now, with respect to these bullets which were furnished to you by someone, will you describe the condition of those projectiles at the time you received them?

A I recall one of them. That was very flat; it was more in the shape of a coin than anything else, and the other one was also flat but the edges were twisted up, and according to the ballistics reports they said it was impossible for them to perform a ballistics. Also the Depot, if I recall, they weren't very sure whether they could furnish up with the exact carbine that Gusik had that particular night.

Q Do you know anything about the qualifications of this professor whose name has been mentioned in connection with these projectiles, anything more concerning his qualifications to give an opinion as to the caliber of the bullet?

MR. DIRENFELD: I object. Leading the witness.

THE COURT: Over-ruled.

A The professor was a medical man for the Italian police. He was also professor of Medicine at the University of Pisa.

Q Now, on cross examination, in answer to a question concerning any statements by witnesses interrogated by you, any statements made by these witnesses to the effect that Gusik received any black market monies, what was your answer?

A Well, according to Parker and Hoy —

MR. DIRENFELD: I object.

COL. CHAPMAN: That is not responsive. I consent that it be stricken.

MR. DIRENFELD: The record will speak for itself as to what his answer was.

COL. CHAPMAN: I have a right; I think I have a right to ask—

Q Do you recall being asked the question as to whether or not any of the witnesses interrogated by you or your assistants stated that Gusik had or had not received any black market funds, do you remember that question being asked?

A Yes, sir.

Q Do you remember what your answer was at that time?

A No, sir.

Q Well, let me ask you this, then. Did any of the witnesses interrogated subsequently by you indicate that Gusik had received black market monies?

MR. DIRENFELD: Object.

THE COURT: Over-ruled.

A Two of the witnesses asd military police.

Q And, are the statements of those two witnesses contained in your CID report?

A Yes, sir.

Q Are they two of the witnesses mentioned by the Petitioner's counsel on cross examination?

Q What are their names?

A Parker and Hoy.

Q And, what did Parker tell you with respect to that question?

A Parker stated on his very first deal in the Depot where him and another soldier had stolen some tires, and it was through Gusik that they had sold these tires to an Italian by the name of Franco, and Gusik had received 15,000 Lira as his share of the deal.

Q And, what, if anything, did Hoy tell you?

A Hoy told me the same as Parker did.

Q Well, what was it?

A That they had pulled the deal at the Depot, something like four or five tires, and that Gusik had made the contact with Franco for the sale of these tires and he received 15,000 Lira for his share.

MR. DIRENFELD: If Your Honor please, I move that the answer be stricken as entirely in contradiction to his earlier statements. This is cross examination of the Government's own witness by themselves.

COL. CHAPMAN: I am not cross examining. I respect fully suggest to the Court that any questions on this matter I would not have asked, except that I certainly state that the Petitioner has opened the door in cross examination, and that I therefore am allowed to have the witness explain his answer fully on redirect.

MR. DIRENFELD: If the Court please, we agree with that last statement, except this is contradicting and to pursue it further would be cross examination.

THE COURT: Well, he has a perfect right to rehabilitate his witness. Objection is over-ruled.

It is purely hearsay on the part of this witness.

COL. CHAPMAN: I concede it is purely hearsay, but I do say that Petitioner's counsel has opened the door.

THE COURT: Yes, the Petitioner has gone fully into this phase of the case.

COL. CHAPMAN: I would not have asked such a question because I realize it is entirely hearsay, but having opened the door I do claim I am entitled to pursue the matter further.

THE COURT: What value is all this testimony?

MR. DIRENFELD: As I said before, we have no objection on going into the same matters which were opened by us as contended. The only thing we say is that you cannot cross examine your own witness when he has answered, to rehabilitate and say something is cross examination.

THE COURT: You went into this matter extensively as counsel for the Petitioner. He has a perfect right to take his witness on a redirect and rehabilitate him. He may answer, over-ruled.

COL. CHAPMAN: As a matter of fact, it was on a motion to strike the answer.

THE COURT: The Court will reserve a ruling and permit the witness to answer.

COL. CHAPMAN: The answer has been given. This was to strike it.

Q Sergeant, are you familiar with the caliber of the M-1 rifle?

A It is a 30 caliber.

Q And, are you familiar with the caliber of the carbine?

A It is a 30 caliber, also, just a little shorter than the 30.

Q You mean the barrel is shorter?

THE COURT: Now, that isn't the question. He is asking whether or not you are familiar with it.

A Yes, sir.

Q In other words, the M-1 and the carbine are both of 30 caliber, is that corect?

A Yes, sir.

Q And, caliber means what?

A That's the diameter of the bow of the rifle.

COL. CHAPMAN: No further questions.

THE COURT: Do you have anything further?

MR. DIRENFELD: Yes, sir, just one or two questions.

RECROSS EXAMINATION

By Mr. Direnfeld:

Q I think you stated just a few moments ago that you were informed that you could not obtain the rifle that Gusik fired from?

A I turned my ballistics bullets over to the Chief Agent for ballistics. It was up to him to obtain the rifle and send it to Rome. It was he who told me that he could not get — Sergeant Tuck and the people at the Depot were not sure whether they could obtain the exact rifle Gusik had that morning.

Q Mr. Urdinarrain, as an investigator, did you go to the supply room, which is where weapons are kept, is that correct?

A Yes, sir.

Q Did you go to the supply room to get the weapons?

A No, sir, I didn't go to the supply room.

Q All right. Now, isn't it a fact that when a weapon is issued to a man in the service the serial number of the weapon is entered after his name?

A That is correct, sir.

Q Isn't it also a fact that in your report you gave the exact serial number of the carbine, is that right?

A Yes, sir.

Q You stated what Parker and Hoy stated about Gusik receiving Lira, and I will ask you again the question I asked you before and that is, you have no statements from any Italian civilians that they paid any money to Gusik, is that correct?

A Not from Italian civilians, no.

Q And, the statements from Parker and Hoy was that they heard, is that correct?

A Parker and Hoy stated to me that Gusik did receive 15,000 Lira.

Q From whom?

A From Franco.

Q Did they state that they saw it, or did they say they heard it? Do you want to check your report?

A Yes, sir. (After checking report) Yes, they said he got 15,000 Lira "and we sold four tires to an Italian named Franco. Private Gusik made the deal with Franco and got about 15,000 for his part."

Q There is nothing in there that he gave him the money, or who gave the money, is there?

A No, sir.

MR. DIRENFELD: That is all.

THE COURT: You are excused. Call your next witness.

COL. CHAPMAN: Sergeant Whitmire.

Samuel B. Whitmire,

called on behalf of the Respondent, being first duly sworn, testified as follows:

Examined by Colonel Chapman:

Q What is your full name?

A Samuel B. Whitmire.

Q And, your present duty station, Sergeant, is what?

A Free territory of Trieste, sir, 281st Military Police.

Q Last week were you ordered by your command to proceed to the United States on temporary duty?

A Yes, sir.

Q In connection with this Habeas Corpus proceeding?

A Yes, sir.

Q And, you arrived when?

A I arrived over Massachusetts at approximately 12:35 hours on the 7th of September, sir.

Q And, you arrived here when?

A I arrived in Columbus at 11:10 hours the 8th of September, sir.

Q That was yesterday, right?

A Yes, sir.

Q Now, during — I withdraw that. What is your assignment in the army at the present time, your duty assignment?

A I am in charge of the American police in Trieste, sir.

Q Are you with the CID?

A No, sir.

Q Were you with the CID during 1947 at any time?

A Yes, sir.

Q More particularly, during the months of August and September of 1947 were you an agent of the CID?

A Yes, sir.

Q Do you know Sergeant Urdinarrain?

A Yes, sir.

Q And, did you know him during August and September of 1947?

A Yes, sir.

Q Do you know Thomas Gusik?

A Yes, sir.

Q Can you identify him here in the court room?

A Yes, sir.

Q Will you point him out to us?

(Pointing) Thomas Gusik with the blue suit on.

COL. CHAPMAN: Let the record show witness indicated the Petitioner.

Q Did you see Thomas Gusik during August and September of 1947?

A I saw him in September 1947, sir.

Q Where?

A In the CID Office in Leghorn, sir.

Q At that time were you making an investigation, or several investigations?

A Yes, sir.

Q What was the investigation upon which you were working which was connected with Gusik in any way?

A It was an investigation of larcenies in Depot 2L76 in Tirrenia, Italy.

Q And, you say you saw Gusik in the CID office, in company with whom?

A Gusik was in Agent Urdinarrain's office, sir.

Q And, that was where you saw him?

A Yes, sir.

Q And, did you have occasion to be in Agent Urdinarrain's office yourself on occasions?

A Yes, I did.

Q And, do you recall the 15th of September 1947?

A The date? No, sir.

Q Well, do you recall an occasion when you were in Urdinarrain's office at which time Gusik was making a statement to Agent Urdinarrain?

A Yes, sir, I recall that.

Q And, where, if you recall, was Gusik seated, Urdinarrain seated, and yourself?

A Gusik was seated in front of Agent Urdinarrain's desk, sir, in a chair. Agent Urdinarrain was seated behind his desk and I was seated at another desk across the room, sir.

Q How far was your desk from Agent Urdinarrain's desk, approximately?

A Approximately six feet, sir.

Q And, were you able to overhear the conversation that took place between Urdinarrain and Gusik?

A Yes, sir.

Q What were Gusik and Urdinarrain talking about at that time?

A Agent Urdinarrain was asking Gusik questions, sir, and when Gusik answered the questions he was writing it down, and he was asking questions in regard to the shooting, homicide, that had taken place at Engineer Depot 2L76. He was asking him about larcenies there and

men that he had worked with, or he was asking him about men that were involved in a case previous to that investigation.

Q At the conclusion of that conversation what did Urdinarrain do?

A (No response.)

Q I will withdraw that. Was Urdinarrain taking this statement down in longhand or on a typewriter?

MR. DIRENFELD: I will have to object to that as a leading question.

THE COURT: Yes, let him tell how he was taking it down. Objection sustained.

Q How was Urdinarrain taking this statement from Gusik?

A He was taking it in longhand, sir.

Q And, when he concluded taking this statement what did Urdinarrain do?

A He left the room, sir.

Q Did he come back?

A Yes, sir.

Q How long was he gone?

A I'd say approximately, maybe ten minutes, sir.

Q And then he came back, did he?

A Yes, sir.

Q And, what did he have with him at that time, if anything?

A He had a statement completed, sir, and he —

Q You say "completed." What do you mean by that?

A Typed up, sir.

Q What did he do then?

A They left the room, sir; he and Gusik.

Q Was the statement, if you know, signed by Gusik while you were there?

A I think it was, sir.

Q Were you at all times present while Urdinarrain and Gusik were in that room?

A No, sir, I left the office and got some papers and came back.

Q When was this?

A I was talking to Italian policemen, sir.

Q When was this?

A That was during the time he was taking the statement from Gusik.

Q I didn't ask you that. When he came back with this typewritten statement, were you then at all times present up until the time they left the room?

A Yes, sir.

Q And, while Urdinarrain was out having this statement typed, did you have any conversation with Gusik?

A No, sir.

Q Did you interrogate him at all?

A No, sir.

Q Have you ever interrogated Gusik with respect this case?

A No, sir.

Q Now, when Urdinarrain came back did you observe Urdinarrain's actions?

A (No response.)

Q Did you see what he did? Yes or no, did you see what he did?

A Yes, sir.

Q And, what did he do?

A He took Gusik out of the room, sir.

Q Did he sign it before he left the room, or didn't he sign it?

MR. DIRENFELD: Object, if the Court please.

THE COURT: Sustained. Let him tell what he did.

A. He —

COL. CHAPMAN: The objection was sustained. You can't answer the question.

Q Will you tell me, then, again, in your own words what happened when Urdinarrain came back to the room?

A (No response.)

Q Did you understand the question, Sergeant?

A Not fully, sir.

Q When Urdinarrain came back with this typewritten statement, which you have testified to, what occurred then?

A He came back and then he and Gusik left the room.

Q All right. At any time did you see Sergeant, or Agent Urdinarrain place his hands on Gusik?

MR. DIRENFELD: Objection, Your Honor.

THE COURT: Well, you certainly brought that out.

He has a right to rebut it.

MR. DIRENFELD: True, Your Honor, but the form of the question.

THE COURT: Yes, the question is leading.

COL. CHAPMAN: I have to get a categorical denial or admission because this witness didn't hear the other testimony, and that is the only way I can get it.

MR. DIRENFELD: Ask what he observed.

COL. CHAPMAN: I did ask what he observed.

THE COURT: Over-ruled.

COL. CHAPMAN: You may answer the question.

A No, sir, I didn't see him place his hand on him.

Q Now, you say Urdinarrain and Gusik left the room?

A Yes, sir.

Q You don't know where they went?

MR. DIRENFELD: Object, Your Honor.

Q Or, do you know where they went?

A I don't know whether he was taking him to have the statement sworn to or not.

Q Do you know of your own knowledge, Sergeant, where they went?

A No, sir.

Q Did they come back?

A Yes, sir.

Q What time of day was this, as nearly as you can remember?

A It was in the afternoon, sir, but I can't recall.

Q Early in the afternoon or late in the afternoon?

A That I don't recall, sir.

Q Did you stay there then, or did you leave?

A I left, sir.

COL. CHAPMAN: You may inquire.

CROSS-EXAMINATION

By Mr. Direnfeld:

Q Sergeant, you were in Urdinarrain's office as assistant, is that correct?

A As his assistant?

Q Yes, did you work under Agent Urdinarrain?

A I worked with him, not under him.

Q Was he in charge of the investigation?

A On that case he had the whole investigation. On that particular case I didn't have that investigation at all.

Q You will have to speak a little louder, Sergeant.

A On that particular case he had the whole investigation. I didn't have anything to do with that case.

Q You didn't have anything to do with that case?

A Not that case.

Q You didn't interview any witnesses?

A Not on that case.

Q On the Gusik case?

A No, sir.

Q And, you didn't talk to any of the officers or other military personnel in connection with your investigation. Do you understand?

(No response.)

Q May I rephrase that if I might. Did you talk to

any Italian civilians or take any statements from Italian civilians in connection with the Gusik case?

A No, that was done by Italian policemen.

Q And, you were not present?

A No, not on the Gusik case.

Q Now, did you take any statements in connection with the Gusik investigation?

A No.

Q From military personnel?

A Not on the Gusik case.

THE COURT: Did I understand you to say that you didn't have anything to do with this case?

THE WITNESS: No, sir, in the way of investigation not on the Gusik case.

Q Now, Urdinarrain testified that you assisted him in this investigation. Would you say he is mistaken?

A That was another case that was directly connected with the Gusik case.

Q But, it was not the Gusik case?

A It was not the Gusik case.

Q Urdinarrain stated that you were present with him during his investigation of the case. Would you say that is correct, or do you think he is mistaken?

A Not the complete investigation, no.

Q Which parts of the investigation, if any, or didn't you have any part in the investigation? That is what we are trying to learn.

A It was a case directly connected with the Gusik case, but the Gusik case I had nothing to do with at all.

Q Now, did you ever talk to Gusik at all?

A I don't recall ever speaking to him.

Q You never spoke to him at all. How many times did you ever see him?

A Twice.

Q When were those two occasions?

A Once there in the CID office and in the hall yesterday morning.

Q And where?

A Out in the hall yesterday.

Q In other words, the first time you ever saw him was the date that his statement was taken, is that right?

A Yes, sir.

Q And, you were not present when the statement was signed, were you?

A That I don't know, sir.

Q They went out; I think you stated before that Urdinarrain took Gusik out of the room.

A He did.

Q And, you don't know where they went?

A No, I don't.

Q I think that you stated that he typed the statement in ten minutes. Do you know that actually to be so?

A Well, I'd say approximately ten minutes. I really don't have any idea because I was talking to Italian policemen while they were out.

Q You stated that you heard some of the conversation that was going on between Urdinarrain and Gusik, is that correct?

A Yes, sir.

Q Did you hear Gusik tell Urdinarrain that he did not participate in black market?

A No, I never heard him tell him that he did not.

Q Did you hear him state that he did not kill anyone?

A No.

Q Well, let me ask you, did you hear him say that he is positive that the bullets from his gun killed two men?

A No, he didn't say that.

Q You are sure of that?

A I know he didn't say that.

Q In other words, he was denying, wasn't he; Gusik was denying and Urdinarrain was questioning, isn't that what was taking place?

A No, he didn't deny shooting the man.

Q But he didn't say the bullets from his gun killed him?

A He said he shot at them.

Q Now, so far as black market activities is concerned, did you hear conversations about black marketing?

A Yes, sir.

Q And, did you hear Gusik say he never had any black market deals?

A No, sir.

Q Did you see Urdinarrain and he sitting down and scratching lines out of a statement?

A I saw Urdinarrain writing while he was asking him questions.

Q But, you didn't see him strike out anything?

A Well, I wouldn't have noticed if he had.

Q Was there anybody else present in the room besides you and Urdinarrain?

A Yes, there was Italian policemen.

Q Italian policemen. And, who else?

A That was all.

Q Was Lieutenant Strano there?

A No, he wasn't in the room.

Q Was he in the next office?

A I don't know where he was.

MR D'RENFELD: That is all.

(Witness excused.)

COL. CHAPMAN: I have no further witnesses at the present time, if the Court please.

With reference to additional witnesses -- the investigating officer whose report of investigation was attacked on the first hearing back in June, is not, or is no longer in the army. His name is William A. Calfee. He presently resides, according to the latest information I have been able to obtain, at 125 North New Hampshire Ave-

nue, Los Angeles, California. The defense counsel, Clarence Burks, whose name of course has been brought to your attention here, is no longer in the army according to the Adjutant General's report. He was separated on his own request, taking his terminal leave and remaining in Italy.

In order to rebut the statements directed at the sufficiency, thoroughness and impartiality of the pre-trial investigating officer's report; namely, former First Lieutenant William Calfee, it will be necessary, since we are unable to subpoena him in a civil proceeding which is more than one hundred miles from this district, to take his deposition, I suggest on closed interrogatories so that we may present the Respondent's complete case to Your Honor.

The same goes for the now Mr. Burks, former Lieutenant Burks, the defense counsel, who present resides in Italy; and while I can't tell Your Honor his exact address, I know that the Theatre Commander will have no difficulty in locating his whereabouts since he is, of course, still an American citizen as far as we know.

So, pursuant to Rule 26, I request that we be allowed to submit to the Petitioner's counsel direct interrogatories to both witnesses for their cross interrogatories and that their evidence be obtained in this manner. In that way it will be unnecessary, as I see it, to hold any additional hearing in open court since the interrogatories would be returned to the Clerk for opening by the Court, and I respectfully make that application at this time.

With the exception of that, the Respondent is in a position to rest.

THE COURT: Is there objection?

MR. PRICE: If Your Honor please, we want to object to any continuance in this matter. This case first started back in December 1947.

THE COURT: Not in this Court.

MR. PRICE: I understand that, but in January it was reviewed in Washington before the Review Board. Now, on April 24 it was filed in this Court.

THE COURT: April 24?

MR. PRICE: Was that April 24?

COL. CHAPMAN: The 27th, I believe.

MR. PRICE: Then, we had a hearing here in June sometime. If the Court will recall, at that time counsel for the Government said that they could get along with a continuance for eight to ten days, or some short period. If you recall, Your Honor, said to them then that you didn't want any further continuances in the case if we would agree upon a date upon which the case should be continued.

Now, we wanted to give them ample time to get all their witnesses and we agreed between counsel, and the Court adopted our agreement that we would continue the case until September 8, and I think the Court said at that time, if I recall correctly, that there would be no further continuances in this case.

Here counsel for the Government have had over two months this summer to get these witnesses here. They knew they were going to need them. We were advised fully and they were advised as to just what the situation was, and I am sure that we went the limit when we said we'd put it over until September 8.

Now, all the time this boy Gusik is in jail. He has been in jail since October 1947. It does seem to me that this is trifling with the rights of a defendant. I want to ask Your Honor, in all fairness to all of us, not to grant any further continuances. Counsel for Gusik has volunteered its services. We have to leave our business to come here. I think the Court has been advised that we are without fee. We are performing these duties gratuitously. Any continuance now places a great hardship upon counsel as well as upon Gusik, and it places no hardship upon the Government. They have had ample time. They have not used due diligence in getting their witnesses here. So, I want to ask Your Honor to please not continue it.

COL. CHAPMAN: If the Court please, in the first place the Government is not asking for a continuance

as such. In other words, I am quite willing for the Government to rest this case as far as any subsequent hearings in open court are concerned.

In the second place, with respect to due diligence, I can hardly fail to believe that this Court cannot but understand that when we have gone to—it isn't a question of trouble; we want this Court to have all the facts — but when we have flown two enlisted personnel from Trieste, free state in order to have them here to give their testimony before Your Honor, and that does not, in my opinion, show a lack of diligence.

Now, with respect to the other witnesses, it is something entirely beyond the control of the United States Attorney or of the army. The army could bring over these two enlisted men because of the fact that they are still in the army and they are subject to military orders and they reported as such, but we are completely unable to force Lieutenant Burks to return from Italy to this country in order to appear before Your Honor, just as we are completely unable, as is the United States Attorney, to compel Mr. Calfee to come from Los Angeles, California, to Columbus to appear. If we had the power of subpoena you can rest assured we would have given, or had the United States Attorney issue a subpoena for Calfee's appearance; at least since he is within this country, but we are utterly unable to compel his voluntary appearance and for that reason our hands have been tied in that respect.

Now, I don't see this as a continuance. I merely ask for the opportunity on closed interrogatories to furnish this Court with all the evidence at our command so that you can come to a proper decision.

THE COURT: For how much time are you asking?

COL. CHAPMAN: I don't want very much time. Whatever Col. Windom thinks. He is more familiar with the Federal practice on interrogatories than I am.

THE COURT: What excuse is there for not proceeding after June 28 and making your request at this time?

COL. WINDOM: The best reason they could assign, Your Honor. I don't believe, in view of that long line of Supreme Court decisions we submitted Your Honor in brief, that we could ever have anticipated this type of evidence going into this record.

THE COURT: Well, you anticipated it on June 28 because some of it went in on that date, did it not?

COL. CHAPMAN: Yes, but if the Court please, I was under the assumption that you were going to give us some decision at this time with respect to whether this evidence, upon which you reserved decision on the 28th, would be accepted and admitted or whether you would reject it, and for that reason it was completely impossible for us to determine in advance what we would have to rebut and what we would not have to rebut, because, as Your Honor knows from the rather short memorandum submitted by us at that time, it is our contention that the Article of War 70, the pre-trial investigation, is not a jurisdictional question and that all evidence with respect to that is not before the court on habeas corpus. That being the case and that being the view that the Government has always taken in matters of this kind, I was at a loss to know whether or not Calfee's testimony was going to be necessary, or whether Your Honor would reject the testimony with respect to the AW-70 as being impartial, as we claim. I frankly admit I am somewhat up in the air on that point.

If Your Honor feels that AW-70, any testimony with respect to AW-70, is properly before you on habeas corpus, then I need Calfee to rebut it. If Your Honor should rule that it is immaterial, as we claim because it it not a jurisdictional prerequisite of the acquisition of jurisdiction by a court martial, then I don't need Calfee's testimony because the Petitioner's testimony with respect to AW-70 being immaterial I don't have to rebut it. But, if Your Honor should rule that it is a jurisdictional requirement; namely, that a thorough and impartial pre-trial is jurisdictional then I am bound to rebut it.

THE COURT: Well, apparently from the nature of the testimony and latitude which has been allowed in presenting it in this case, counsel for the Petitioner is taking the attitude, at least the record would lead the Court to believe, that this Court is sitting as an appeal or review court of a court marital judgment, and such is not the case. You gentlemen are not in agreement on the law governing habeas corpus proceedings.

COL. CHAPMAN: We certainly are not.

THE COURT: You are as far apart as two poles. Until you are able to assist the Court in settling the applicable law to this case, of course, the Court is not prepared to say how much of this testimony, if any, will be considered by the Court. As the Court instructed you this morning, this Court is not concerned with the guilt or innocence of this Petitioner. The thought in the mind of the Court is whether or not the scope of this hearing should be as indicated by counsel for the Government in its briefs when it said that there were four propositions presented to the Court: First, whether the court martial court was properly constituted; secondly, whether it had jurisdiction of the person and the subject matter; third, whether it had power to impose the sentence it did impose; and fourth the question of jurisdiction are properly the subject of this inquiry.

Now, you gentlemen take a contrary view.

MR. PRICE: Your Honor, have you read the briefs that we have submitted?

THE COURT: Yes, the Court has read the briefs.

MR. PRICE: Did you read the last briefs we submitted in which we set up that all of the decisions within the last ten years favor our view of this lawsuit?

THE COURT: Apparently at first glance, you would think that the Courts have deviated in their consideration of the viewpoint which has been entertained in the past as to the examination by a civil court in habeas corpus proceedings of a court martial. Some of the syllabi would indicate that the court martial proceedings are open to attack, but the Court must confess that it hasn't

been able to satisfy its own mind that that is the true situation. Now, you gentlemen may be able to do it.

Do you want to file further briefs? The Court does not want to grant you a continuance; The Court doesn't see any necessity for it. You have had since June and you were appraised of the ruling the Court at that particular time.

COL. CHAPMAN: We were, and we weren't.

THE COURT: You brought these witnesses here today.

COL. CHAPMAN: Yes, I did, because they were subject to military law and I could force them to be here. I couldn't bring these other witnesses here.

THE COURT: Yes, but you could have submitted their interrogatories sometime between June and September. It seems to the Court that the Government has had ample time.

COL. CHAPMAN: I am not asking for a continuance as such. I know it won't be necessary for any of us to come back here to this Court if the depositions will be submitted to the Court for opening and perusal by Your Honor. Now, certainly in view of the state of our differences here between counsel for the Petitioner and counsel for the Government with respect to the rights and powers of the court on habeas corpus, we are going, of necessity, to have to brief this case at some length. Now, in order to brief it—

THE COURT: That is true.

COL. CHAPMAN: That is true. I know I want to help Your Honor, and I know that it is equally true that we cannot very well brief the evidence adduced here at the hearing until first we get a copy of the stenographic minutes. I have only Gusik's testimony to date because that was the only important testimony offered in June. We are going to have to wait for the testimony of the present two-day hearing, which will take some time, and in the meantime if we are allowed—it isn't going to be a lengthy deposition—to rebut the statements which are all presently contained, mind you, in the transcript of

the testimony which we do have; namely, Gusik's testimony, and if we are allowed to submit short interrogatories on that and the Petitioner cross interrogatories, I don't see why, and I am positive it is not going to delay this Court in arriving at its ultimate decision because we will have to spend considerable time briefing this for Your Honor. I know I want to very definitely because I am very anxious to set forth all our contentions as fully as possible.

THE COURT: That is true. This is a very important case to the Government of the United States as well as to this Petitioner.

COL. CHAPMAN: May I say this with respect to that, for the Court's consumption and for Petitioner's counsels' consumption, that the Government; namely, the army in this case, has no interest in keeping Gusik in jail. This case, to us, is nothing more or less than an attempt to sustain the orderly process of military justice. If the military justice procedures here were wrong, and this Court so finds, then that is the end of it as far as we are concerned. If the military justice procedures were complied with substantially, and as the cases have held that in the military, military justice procedures constitute due process, then that is the answer. But, we don't come here with any axe to grind; at least, I don't; nor does the War Department, against Gusik or anyone like Gusik. We are here merely to see that the military justice procedures, the orderly justice procedures, are litigated here on the principle of it.

THE COURT: Naturally, this Court is not desirous of transgressing beyond the authority which it has to make inquiry into such matters as this. The Court understands that your military tribunal is a creature of the statutes of the United States of America. The Congress has set up the military court and made provision for them, and it is a serious question confronting this Court as to how far this Court may go. This Court has been of the opinion in the past that it is pretty much a jurisdictional question, and some of the later decisions

might indicate that there has been an indication on the part of the Courts that a collateral attack is permissible upon the proceedings of the military tribunal in court martial. The Court is not prepared to say.

COL. CHAPMAN: The circuits differ, there is no question about it.

THE COURT: The judges have written very diverging opinions, or else the gentlemen who wrote the syllabus in the various cases have different opinions. Now, this Court will eventually try to settle the law insofar as it applies to this particular case, but it would be very helpful to the Court if you gentlemen would try to reconcile, if possible, your differences as to what the law is, or at least thoroughly brief the case.

COL. CHAPMAN: I'll be glad to thoroughly brief it.

MR. PRICE: We are asking the Court to determine law, Your Honor.

THE COURT: Well, of course, the Court will determine the law.

MR. PRICE: The reason we are here is because we don't agree.

THE COURT: I understand that, but you place a construction upon some of these cases in your brief which this Court is unable to follow, and the Court has made more or less research and examination of the case as presented by counsel and at this particular moment this Court is not in accord with your viewpoint: That you can collaterally attack the proceedings of this military tribunal.

Now, if you are able to show the Court by argument or brief—and the Court would prefer brief—perhaps this Court might be able to consider a lot of this testimony which has been adduced; but unless you do I would say at this time that the major part of this testimony will go out. But, the Court is not ruling on it at this time; the Court is merely advising you.

MR. PRICE: We have an innocent man in jail according to our view of this case.

THE COURT: I told you a moment ago this Court is not concerned with the guilt or innocence of this man, but it is concerned as to whether or not the due process clause of the constitution has been violated, and in that respect, whether or not a fair trial was had. This Court can't retry this man. This Court cannot sit as a reviewing court upon a military tribunal; this Court is a civil court.

MR. PRICE: We are asking Your Honor to pass on the question of whether this man has been deprived of his constitutional right.

THE COURT: That is the question: Did he have a fair trial. It is not whether he is guilty or innocent of the crime. If he did not have a fair trial, if his constitutional rights have been violated, of course it is the duty of this Court to make that determination.

Much of the testimony of the Petitioner has refuted the record in this case; made a flat denial of it. All well and good. The Court does not know how far it can consider the testimony. The Court has given you a wide latitude, but we are not trying this case on sentiment.

MR. PRICE: But, what is to be gained by continuance of this case?

THE COURT: The Court hasn't granted a continuance. The Court is merely asking you to settle the law in this case. You gentlemen haven't settled the law.

MR. SKLENICKA: It's not a question of making a speech, but apropo to the request for continuance—

THE COURT: The Court hasn't granted a continuance and there is no necessity for a speech on the question of continuance.

MR. SKLENICKA: I'd like to confine my remarks and address the Court on the law of habeas corpus, because I appreciate that the Court has admitted a great deal of testimony under reservation.

THE COURT: The Court has promised you an opportunity to make a speech. You will be given the opportunity at the proper time, but the Court does not think it would be of much benefit to the Court at this

particular time for an oral discussion of the law. An exhaustive brief which would try to reconcile, if possible, some of the decisions of the various courts would be more helpful to this Court.

The Court will take a brief recess at this time.

(Whereupon a short recess was taken.)

THE COURT: Did you desire to be heard further?

COL. CHAPMAN: This has nothing to do with our prior argument, but I have noticed during the proceedings that Respondent's Exhibit A has a loose page.

THE COURT: The Court called your attention to that yesterday.

COL. CHAPMAN: I want to find that page and I want to identify it for the record and indicate just where it belongs in the record.

MR. MORGENSTERN: There will be no objection.

COL. CHAPMAN: I would also like to ask your secretary or clerk if you have a stapling machine so it can be stapled in its proper place and doesn't get lost.

MR. DIRENFELD: If it please the Court, may I make inquiry concerning this insert which the Colonel wishes to make?

THE COURT: Yes.

MR. DIRENFELD: Is this part of the original file?

COL. CHAPMAN: Oh, yes, just inserted in the proper place.

THE COURT: How much time will you desire to brief this case?

MR. MORGENSTERN: On the matter of briefing it before the Court on oral argument, Your Honor—

THE COURT: The law is applicable to the testimony as submitted.

MR. MORGENSTERN: About a half hour, I would say.

THE COURT: The Court doesn't want oral argument. The Court wants a brief.

MR. MORGENSTERN: I see. May I have a few minutes.

THE COURT: It is not that I am foreclosing you from oral argument at the proper time, but at this particular time the Court would prefer briefs.

MR. DIRENFELD: Is there any reason why you cannot submit your interrogatories and briefs within a reasonable period and consider the case as closed?

COL. CHAPMAN: None whatsoever. I am quite willing, as I said before, to rest the Respondent's case at this time with the privilege of immediately submitting interrogatories to counsel for the Petitioner for cross interrogatories. I shall do it through Col. Windom since he is here in the District and, of course, we are not.

THE COURT: That would not delay the decision in the case. There would be no necessity for granting a continuance. It was the thought in the mind of the Court that the case not be completely closed until you have submitted additional testimony, but at the same time you could file your briefs.

COL. CHAPMAN: I would suggest that while the interrogatories are being prepared that we work on our briefs at the same time.

THE COURT: That was the thought in the mind of the Court.

MR. PRICE: I think that is all right.

THE COURT: Now, this case is of great importance to the Government of the United States as well as to the Petitioner. The Court does not think it is a case which calls for undue haste upon the part of the Court or counsel. Now, these propositions may seem elementary to you lawyers, but to this Court they are serious problems.

I am sure one of the latest pronouncements of the Supreme Court in the Yamashita case might indicate that the theory upon which you tried your case, the evidence which you have submitted may be in error. The Court is not prepared to say, but the Court calls your attention

to one part of the opinion in the Yamashita case in which the Court has this to say, and I read from the opinion:

"We also emphasized in Ex parte Quirin, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See Ex parte Vallandigham; In re Vidal and Ex parte Quirin. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power 'to grant writs of habeas Corpus for the purpose of an inquiry into the cause of restraint of liberty.' 28 U.S.C. 451, 452. The Courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." Quoting several cases.

Now, the Court thinks it would be very helpful for you gentlemen to reconcile some of the decisions.

MR. SKLENICKA: If the Court please, may I just--

THE COURT: The Court does not care to go into the details, but that is the attitude of the Supreme Court of the United States as to the power of the civil court to review what has taken place in a military tribunal, which is a creature of the statute, authorized by the Congress of the United States.

Now, you gentlemen have evidently taken the viewpoint, unless the Court is mistaken, that you can make a collateral attack upon these proceedings. I don't think I am in error in stating that. Your brief would so indicate. Isn't that your position?

MR. SKLENICKA: Yes, sir, that is our position, but may I address the Court—

THE COURT: What do you say as to this pronouncement of the Supreme Court in the Yamashita case?

MR. SKLENICKA: That case does not involve a United States citizen, and the Constitution of the United States of America and the Constitutional guarantees under the Fifth Amendment are not involved.

THE COURT: What the Court just read to you has no concern with this except as a general statement of the position of the Supreme Court of the United States as to the power of the civil courts to review the decisions and judgments of a military tribunal.

MR. SKLENICKA: But, habeas corpus proceedings are identical and we have United States Supreme Court decisions which we have cited before this Court in a series of briefs, many of which were voluminous, and we have the latest authorities. Now, the question is: What is the law today; not what it was twenty or forty or fifty years ago. The question is: What is the law on habeas corpus today. We start at 1937 when the United States Supreme Court changed the line of decisions and entirely the theory of habeas corpus proceedings and the right of attack in Federal courts.

THE COURT: You have stated a proposition clearly. Now, give the Court a brief on it.

MR. SKLENICKA: We have the United States Supreme Court and we will trace those from 1937 to 1948, followed by Circuit Courts and followed by District Courts who have followed the United States Court decisions on this very question: That under a habeas corpus proceeding before a court, the Court must look at the record; the Court must admit testimony; and the Court

must hear arguments. Those are mandatory provisions which have been decided by the United States Supreme Court, and that is what we have tried to do, and the reason we have brought before this Court the evidence to support our contention that there was not a fair and impartial investigation; that there was not a fair trial; and because of those things the rights of this defendant were invaded; and it comes clearly within that theory, the present day theory of habeas corpus.

THE COURT: Upon that theory the Court has permitted you to make your record. Now, submit to the Court the law which will permit this Court to consider the evidence which you have in the record.

MR. SKLENICKA: We will be very happy to do that.

THE COURT: Without granting the Government continuance, you will be afforded thirty days in which to file briefs, and you must have any additional testimony in within thirty days, so you better submit your interrogatories immediately. If not, the case will be considered as closed upon the filing of briefs. If you have any further testimony which you want the Court to consider you must have it in at the expiration of the thirty days.

COL. CHAPMAN: I am quite certain that I will be able to get the testimony of Calfee in Los Angeles in that thirty-day period, but Your Honor will have to consider that the other interrogatories will have to go to the theatre; in other words, in Italy and—

THE COURT: The Court recognizes that. The Government of the United States has flown witnesses back from Italy. This case, as we have mentioned on previous occasions, is very important to the military, to the United States Government as well as to this defendant, and the Court must consider the respective position and rights of the Government of the United States as well as the Petitioner. It means a lot, no doubt, to the United States as to what may come in the future.

The Court wants to thank you for your cooperation at this point.

MR. MORGENSTERN: Just one more thing.

THE COURT: The Court is not going to foreclose this.

MR. MORGENSTERN: May we have a stipulation with the Colonel that Gusik would, if he takes the stand, deny the statements and allegations made by Urdinarrain—

COL. CHAPMAN: Which have not already been denied in his principal examination in chief?

MR. MORGENSTERN: That is right, that he would deny in rebuttal testimony the statements taken by Urdinarrain.

THE COURT: Is that agreeable to all parties?

MR. MORGENSTERN: Yes, sir.

COL. CHAPMAN: Yes, sir.

THE COURT: Do you understand the order of the Court? The case will be considered closed at the expiration of thirty days, and you will have that period of time in which to submit your briefs and any additional testimony.

Do you want to agree that that shall be from the time you get the record?

COL. CHAPMAN: From the time we get the record, because I really can't prepare a brief without the record.

THE COURT: If you want oral argument the Court will afford you the opportunity of oral argument.

MR. MORGENSTERN: May I inquire as to the record so that we can judge the time of the continuance.

THE COURT: Your thirty days will commence from the time you receive the record. The Court will assign a date for oral hearing after the briefs are all in and the case is considered submitted. How much time will you want for oral argument?

MR. PRICE: Three hours, I think.

THE COURT: Colonel, you are outnumbered.

COL. CHAPMAN: Very frankly, I don't think I am going to have the privilege of appearing here before Your Honor. I will be in Germany then. Colonel Voorhis undoubtedly will be back, and I imagine an hour should suffice.

THE COURT: Now, gentlemen, the Court trusts you will endeavor to reconcile some of these decisions, and if the Courts have taken a different direction perhaps you may be able to explain it fully in the briefs.

MR. PRICE: Might I ask the Court to examine a brief which was filed by Col. Fletcher R. Andrews, who was deemed the officer of the Western Reserve University and who served in the Judge Advocate General's Department during the entire time of World War II. Judge Andrews offered to file a brief; he volunteered and he has presented a very fine brief. It is in the record in this case, and I would just like to call the Court's attention to it from the standpoint of the modern law of habeas corpus, and if you don't have it in the record I have a copy here that I would be glad to leave with you.

THE COURT: The Court will be very glad to consider any information or law which may be helpful to the Court in ultimately disposing of these most difficult questions.

Is there anything further, gentlemen?

COL. CHAPMAN: I might ask the Court one question with respect to the availability to the Court of such publications as the Manual for Courts Martial and the Military Justice Procedures.

THE COURT: It would be helpful if you would submit copies.

COL. CHAPMAN: I would be very glad to furnish Your Honor with copies.

THE COURT: Is there anything else you gentlemen desire?

MR. MORGENSTERN: That is all at this time. We want to thank the Court for the courtesy extended us.

THE COURT: It has been a pleasure to have you gentlemen from Cleveland and Washington. If there is nothing further in connection with this case the Court will adjourn until tomorrow morning at ten o'clock.

I hereby certify that the foregoing is a true and complete transcript of my notes taken at the time indicated.

IRMGARD E. MODLICH,
United States District Court
Reporter for the Southern
District of Ohio.

Friday Morning Session

January 7, 1949

THE COURT: There is pending a motion to quash interrogatories. The Court will hear you first on the motion to quash.

COL. WINDOM: If I might interrupt, I think we can dispose of that motion. Respondent moves, Your Honor, to reopen the case and permit the Respondent to place Lt. Calfee on the stand as a witness. The interrogatories were directed to Lt. Calfee who resides in California. The Respondent felt that he carried out his agreement fully, that the interrogatories were submitted properly. However, in view of the fact that the Petitioner has objected to them we have gone to the expense of bringing Lt. Calfee here and request Your Honor to reopen the case and permit him to testify.

MR. MORGENSTERN: If it please the Court and counsel, Petitioner's counsel are objecting very strenuously for this reason. I want to state that this is the record on page 279 with reference to a statement by Col. Chapman.

> "I have no further witnesses at the present time, if the Court please.
>
> "With reference to additional witnesses – the investigating officer whose report of investigation was attacked on the first hearing back in June, is not,

or is no longer in the army. His name is William A. Calfee. He presently resides, according to the latest information I have been able to obtain, at 125 North New Hampshire Avenue, Los Angeles, California."

Now, the Court informed them at the time that they have had sufficient time through the summer months to take interrogatories. The Court further informed them that after the filing of the briefs the case is closed and that we would proceed on the matter of final oral argument. If we were to permit the testimony and not object to the matter of the testimony of Calfee, this case could go on for a long period of time. We would then desire the opportunity to combat any testimony which might be given by Lt. Calfee. It would go on to a point where there would be endless litigation and there would be no termination to give the Court an opportunity for a decision in this case.

I think the issues have been met. We are here this morning primarily for the purpose of submitting final arguments to Your Honor, and we are objecting because I believe the Court did say, as contained in the record, that the Court is not going to grant a continuance, that the matter so far as this Court is concerned is closed, and that the matter will be submitted to Your Honor on final oral arguments which we are prepared today to go forward with, and we are stating our objections to the introduction of any new or additional testimony after the close of the case.

COL. WINDOM: I must answer to—

MR. PRICE: May I say, Your Honor, in addition, keeping this man a prisoner in jail any longer is a practical denial of justice. We have come down here today to argue this case. Now we are presented with a motion to reopen the case. We don't feel that that is proper at this time, especially in the light of the repeated warnings of the Court that the case was closed and that no

further evidence would be heard. We have been given thirty days to file our briefs. They have been filed.

COL. WINDOM: Thirty days from what date, may I ask?

MR. PRICE: I think it was thirty days from the time of the completion of the record. The record will show that.

COL. WINDOM: From the receipt of the record by counsel.

MR. PRICE: In any event, the Court said the case was closed and gave use time to file our briefs. Now, what are we doing here? Just stringing the case along to keep this man in jail? We are here pleading that there has been a denial of due process of law. I can see nothing more to this proposition this morning than a practical denial of process of law if this case is reopened at this time.

MR. MORGENSTERN: I just want to add one thing before Col. Windom states anything. On Page 287 the Court had this to say.

> "Yes, but you could have submitted their interrogatories some time between June and September. It seems to the Court that the Government has had ample time."

I believe that the Court was very insistent upon that statement at the time, insofar as the question of giving the Government sufficient time to present their entire case is concerned, and I believe that they have had that time.

COL. WINDOM: The best answer to that is of course in the record. We made an agreement here that within thirty days after the receipt of the record by counsel—and the record was held up quite a while as Your Honor knows—we would submit our interrogatories and the other side would submit their's and they would be sent to Calfee. At that time we thought Calfee was still in civilian life. If Your Honor desires that he go on

the stand on that point alone, he will testify that he was discharged from the armed services and did not re-enter until last summer. Actually, the way we found out he was still in the service is this. Col. Chapman, who has appeared in this case from time to time, was ordered to the European Theatre. On the orders which ordered Chapman to the European Theatre also appeared the orders relative Calfee. In that accidental way is the way we found out he ws back in the army. When we checked previously he was out of the army and in civilian life, which accounts for the confusion as to his whereabouts.

Now, to be fair on this thing, the Court has allowed very wide latitude. They have attacked the investigation. The Investigating Officer is in the court room. Either we should go forward with our agreement and send him back to Santa Barbara and take his deposition, or else the Court should permit him to testify at this time; or, in the alternative, go back and completely clear the record of all reflections on the investigation.

MR. MORGENSTERN: In answer to that, Your Honor, may I state this. I don't like to be jumping up and down. The question of the filing of the brief was thirty days from the time of the receipt of the transcript of the testimony. That is correct. However, during that period of time, up to the time that we did receive the transcript and during the period of time of the filing of the briefs, it was understood definitely and the Court so stated that whatever further they had to submit they should submit, and this is the statement of the Court on page 302. "Do you undersand the order—

THE COURT: Will you first refer to the statement of the Court on page 300, in which the Court stated and I quote—

> "Without granting the Government continuance you will be afforded thirty days in which to file briefs, and you must have any additional testimony in within thirty days, so you better submit your

interrogatories immediately. If not, the case will be considered as closed upon the filing of briefs. If you have any further testimony which you want the Court to consider you must have it in at the expiration of the thirty days."

COL. WINDOM: I don't believe Your Honor would require us to attempt to draw out of our imagination the questions for this witness without having the record before use. Your Honor wouldn't try that.

THE COURT: That isn't the question, Col. Windom. I assume you are addressing your motion to the sound discretion of the Court, but what is your authority for reopening the case at this time?

COL. WINDOM: Simply this. Your Honor has been most lenient with the Petitioner. Your Honor should go at least a fraction of the way with the Respondent.

THE COURT: Naturally this court wants to be fair with the Petitioner and with the Respondent.

COL. WINDOM: I have asked you to do one of two things. To go back and sustain our motion, take out all reference to the investigation report and Gusik's criticisms thereof, or else permit the Investigating Officer to tell his story. It seems to me, in fairness, we have to stand on either one side or the other of the thing. We can't permit the Petitioner to challenge and the Respondent not to answer. After all, we spent a lot of money in this case.

THE COURT: You have had your opportunity to answer, have you not?

COL. WINDOM: No, sir. Until Col. Thayer Chapman was ordered to the European Theatre neither Col. Voorhis, Col. Chapman, nor myself realized that Lt. Calfee was back in the service and subject to orders. We had checked; as he will tell you himself, he was out of the service for a considerable time. He went back in in late July of this year.

THE COURT: When did you first discover that he was available?

COL. WINDOM: Can you answer that, Col. Voorhis?

COL. VOORHIS: Some time after the last hearing, Your Honor, when we notice his name on the same page, or the next page, on War Department printed orders that referred to Col. Chapman. We noticed the spelling of the name and went to the record and checked what we knew about him and the serial number, and found it was the same man. We did not know that he was on active duty in the army during the last hearing.

COL. WINDOM: The best answer is this, Your Honor. We brought two people from Trieste, Italy. It can't be thought that the Government would spend that much money and leave this officer sit in Santa Barbara if we knew it.

THE COURT: That is not the thought in the mind of the Court. The Court has no desire to foreclose you, but at the same time ultimately a case must end.

MR. SKLENICKA: May I interject at this moment? Col. Windom says they couldn't find out where Lt. Calfee was at the time, and yet in September, which I think was the last time we were in this Court, we had information and made the statement in Court, at least I had the information from the Department of California, the American Legion, that Lt. Calfee was then on maneuvers at Fort Benning, Georgia. So, they certainly knew where he was.

THE COURT: Is it the intention of the Government to withdraw your motion to quash the interrogatories? Is it your intention to withdraw the interrogatories?

COL. WINDOM: Yes, sir, if Calfee is permitted to testify. There is no reason to have the interrogatories and also have him here.

THE COURT: He is present?

COL. WINDOM: This is Lt. Calfee seated here at the table, sir.

THE COURT: How much time will you desire to argue this case?

MR. MORGENSTERN: Your Honor, I would say about an hour and a half minimum.

THE COURT: Do you all want to make a speech?

MR. PRICE: About two or three of us.

MR. MORGENSTERN: There will be three.

THE COURT: How much time will the Government require?

COL. WINDOM: Thirty minutes, Your Honor.

THE COURT: The motion to withdraw the interrogatories will be granted. The motion to reopen the case is addressed to the sound discretion of the Court. Since the witness is present, the Court will grant the motion to reopen for the purpose of taking the testimony of this witness alone. You may call the witness.

MR. MORGENSTERN: We are taking our exception to the rule.

MR. DIRENFELD: May we at this time inquire from the Court what the procedure would be toward rebutting whatever evidence Lt. Calfee might introduce.

THE COURT: You will have that opportunity, or you may argue the case today and close the case.

MR. DIRENFELD: We may have our alternative at the close of this case?

THE COURT: That is true. The Court will give you the choice of closing the case or rebutting the case. If you decide to close the case the Court will hear final arguments.

And also:

William A. Calfee,

called on behalf of the Respondent, being first duly sworn, testified as follows:

Examined by Col. Voorhis:

MR. MORGENSTERN: May it please the Court, before the witness is interrogated—there are no other witnesses?

THE COURT: There will be no other witnesses other than rebuttal of this witness' testimony. The Court wants that clearly understood by Petitioner and Respondent.

You may proceed with the examination.

Q What is your full name?
A William A. Calfee.
Q What is your present occupation?
A U. S. Army Officer.
Q What is your grade in the Army?
A First Lieutenant.
Q During 1947 what was your occupation?
A I was First Lieutenant in the U. S. Army.
Q Where were you stationed?
A Leghorn, Italy.
Q Were you at any time separated from active duty?
A Yes, on December 2, 1947.
Q When did you re-enter upon active duty?
A 21st of July 1948.
Q Where are you presently stationed?
A Santa Barbara, California.
Q Were you stationed at the Port of Leghorn?
A Yes, sir.
Q In Italy during 1947?
A Yes, sir.

MR. MORGENSTERN: Pardon me. Would you stand on the other side so we can hear.

Q In September of 1947 what was your principal duty?

A I was the Investigating Officer for the Port of Leghorn and Headquarters, Mtousa.

Q In connection with your duties as Investigating Officer, were charges against Thomas A. Gusik referred to you for investigation?

A They were.

Q Do you know Thomas A. Gusik?

A I do.

Q Do you see him in the court room?

A Yes, he is right there.

COL. VOORHIS: Is the Respondent's Exhibit, the transcript of the record by court martial here?

MR. MORGENSTERN: Before inquiring, may I for the purpose of the record state, of course, that we are objecting to this proceeding and the witness at this time, and we are taking our exceptions to the ruling of Your Honor.

THE COURT: You may have your exceptions.

MR. MORGENSTERN: Thank you, sir.

Q I am passing to you Respondent's Exhibit A. The pages in this exhibit are numbered in the lower right hand corner. Fold it back as they are numbered on the back of the page, turn up the corner and you will see the numbers. I will ask you to turn in that exhibit to page 22 c and ask you what that page is?

MR. MORGENSTERN: Now, may it please Your Honor, we are going to object. I don't know what the purpose of attempting to have a witness identify a page is. The matter is in the record. If it is a question of refreshing any statements which the witness had, I think they should first attempt to exhaust his memory as to whether or not he knows what took place without attempting to have the witness revive his memory from a record which he probably has not seen for a long period of time.

COL. WINDOM: He has been reading it for several days.

MR. MORGENSTERN: If he has been reading it for several days, I believe he first should be interrogated

as to his memory, and if his memory fails then the record should be shown to him to refresh his memory.

THE COURT: This report of the Investigating Officer is a part of the record, is it not?

MR. MORGENSTERN: It is, Your Honor.

THE COURT: Read the question, please.

THE REPORTER: I will ask you to turn in that exhibit to page 22 c and ask you what that page is?

THE COURT: He may answer. Over-ruled.

MR. MORGENSTERN: Exception.

A That is my report of investigation to the charges dated the 18th of September against Thomas A. Gusik.

Q And, is that your signature on the succeeding page?

A It is.

Q And on the preceding page what do you find?

A The summary.

Q No, the preceding page, page 22 b?

A That is the letter appointing me as the Investigating Officer to investigate the subject charges.

Q When you received that letter what did you receive with it?

MR. MORGENSTERN: May I ask for the date concerning the appointment. You state something of September 18, 1947. That was after the confession was obtained from Gusik. Now, if there is any investigation made afterwards, we are going to object because this is not a proper witness to determine what had taken place prior to getting the coerced and forced confession.

THE COURT: He may answer.

MR. MORGENSTERN: Exception.

Q What is the date of your appointment as Investigating Officer?

A The 18th of September 1947.

Q What did you receive with that letter of appointment?

A The charge sheet containing the charges, the CID report of investigation with attached exhibits.

Q Now, what did you do after you received this

letter of appointment and charge sheet and the accompanying papers?

A Upon receipt of the charge sheet, I with my stenographer — we — I rather read the evidence as was contained in the CID report of investigation. I then proceeded to the 7103rd Disciplinary Training Center at Pisa, Italy, and obtained an interview with Private Gusik.

Q That was sometime between the 18th and 25th of September 1947?

A Of September 1947.

Q What did you do and say during that interview, and what did Gusik do and say?

MR. MORGENSTERN: If the Court please, at this time I am going to object. Here is a man charged with first degree murder, not having assigned to him counsel to defend him. A highly improper procedure was followed by the appointment of an Investigating Officer after a practical indictment or charges. The defendant, Thomas A. Gusik, had nobody to speak in his behalf, had no lawyer to represent him, had nobody there to intercede for and in his behalf. And here is a witness being brought in who was to further substantiate, which we claim, a matter of a coerced or forced confession. At this time, if the Court please, we are objecting to anything which might have taken place after charges were preferred.

THE COURT: The Court stated at the commencement of this case that it would permit the Petitioner to tell his story. The Court has the same feeling toward the Respondent. The Court intends to hear the entire story. Your objection is over-ruled and the witness may answer.

MR. MORGENSTERN: Exception.

COL. VOORHIS: May I make one statement at this point which is in the nature of argument? Our position is that this report of investigation is part of the record. It cannot be impeached by parole testimony in this kind of a proceeding, and the Petitioner cannot impeach it as he attempted to do. Now, the sole purpose of bringing

this witness from California here is to meet the evidence which we say was wrongly introduced which impeaches the written record.

THE COURT: The Court has already ruled. There is no need to tell the Court why you brought him here. He is here and is testifying.

Q Will you tell us what each of you said and did during that interview.

A When?

MR. MORGENSTERN: May I ask—

THE COURT: Just a moment. This investigation is a part of the record, is it not?

COL. VOORHIS: Yes, sir.

THE COURT: Are you offering this testimony to rebut the testimony of the Petitioner, Gusik?

COL. VOORHIS: Yes, sir.

MR. MORGENSTERN: If it is part of the record over there, if the Court please, they have submitted it.

THE COURT: Well, this is a part of the record. As I understand it, this witness is in rebuttal. Is that the purpose for which you are offering this testimony, to rebut the testimony of the Petitioner?

COL. VOORHIS: The Petitioner testified as to what the Investigating Officer did and didn't do, and he impeached the record by his testimony. Now, to rebut his oral testimony I would like the Investigating Officer tell us what took place.

MR. MORGENSTERN: May I ask at this time that he testify and not read. In other words, if he had a conversation with him, I don't think there should be a prepared statement; and as was stated by Col Windom that he had read this matter several times before appearing in this Court, I don't want to make any charges of the fact that this man was prepared to come into Court, but if he has any testimony to give he should give it as a witness and not read it as a statement which is submitted to this Court.

THE COURT: He may answer. Objection is overruled.

MR. MORGENSTERN: Exception.

A Private Gusik, myself and my stenographer, a Mr. Porciello, were given a private room. I introduced myself to Private Gusik and told him that I had been appointed as Investigating Officer to investigate the charges dated the 18th of September against him under Article of War 70. I told him my name. At that time we were all seated. I read then the data from the charge sheet, the personal data contained on page 1, and verified the personal data as concerning the accused, Gusik; read the list of witnesses against him and verified the confinement data contained on the first page of the charge sheet. He stated that the charge sheet was correct—the front page of the charge sheet was correct.

Q Is that the charge sheet, copy of which appears on page 31 to 33 of the exhibit before you?

A Yes, I am referring to 31 in this record, the first page of the charge sheet. I then read him the charges against him and the specifications—

THE COURT: Are you reading from this record?

THE WITNESS: No, I am not, sir.

THE COURT: You will hand the transcript to the reporter.

A —which is the second page of the charge sheet, informed him who was his accuser, and at that time—after that I advised him of his rights under the 24th Article of War from the Manual for Courts-Martial, and explained his rights by telling him that he did not have to make a statement, anything that he said could be used against him should my investigation—or rather the case then before me should result in his trial. At that time he stated he understood his rights under the 24th Article of War. Then we proceeded to read all of the enclosed exhibits and statements in the record of the CID investigation. I did this by reading them to him and by letting him examine them. The documents were examined by Gusik and were also read by him. At that time I ex-

plained to him his rights under the provisions of Article of War 70 as to what he was entitled to.

Now, in the Italian Theatre, or the Headquarters, Mediterranean Theatre of Operations, it was standing operating procedure, due to instructions from our higher headquarters, the Commanding General, that if an accused person so desired they could be represented by one of the properly appointed defense counsels of the General Court at the time of investigation, and they stretched this a little bit and would allow him to choose a counsel if the counsel was reasonably available. I informed Gusik that he had perogative of examining or cross examining any of these witnesses that had made statements in the CID investigation.

MR. MORGENSTERN: May I interrupt at this time? These are just voluntary statements. He is asked to relate the testimony or conversation he had with Gusik, and here he is giving a fully complete, prepared verbal statement as to all the aspects of this case, Your Honor. He was just asked to give the conversation with Gusik.

THE COURT: Yes, the witness will answer the questions.

MR. PRICE: Your Honor, I would like to object further to the conclusions of the witness, that he "explained", that he "verified". Those words are improper in this kind of testimony and in conversation. What constitutes an explanation?

THE COURT: Proceed with the examination.

Q Will you continue telling what each of you said and did during that interview.

A Very well. You want me to go back and relate it?

Q I want you to continue relating what each of you said and did during that interview.

A At that time I stated to Private Gusik "It would be to your advantage to have a counsel who was an attorney to cross examine or examine any of the witnesses whose statements he had just read". Whereupon he replied that his defense attorney would do that at the time of the

trial. I told him this. "You have your choice with the Port of Leghorn of four regularly appointed defense counsels, Col. Whellen, Capt. Richie, Capt. Robeson, or Lt. Burks and Capt. O'Leary. At that time Gusik stated that he desired from that group to be represented by Lt. Burks. However, he stated that he did not need a counsel at that time, that he would be represented by one just before or at the time of the trial, or words to that effect; that last statement. After his refusal to take a counsel to proceed with and accomplish the Article of War 70 investigation, I told him, or rather asked him, "Do you have any persons that you want me to examine or cross examine for you?" He said no. I then asked him if he had any witnesses that he wanted me to examine and obtain statements from. I believe the answer he gave was no.

MR. PRICE: Object to the answer. The witness says he believes.

THE COURT: Yes, do you know?

THE WITNESS: Yes, I do know. If that was requested a statement would be attached to the record, and there are none. Does that clarify it?

MR. DIRENFELD: No.

THE WITNESS: The record would contain any statement that Gusik had asked me to obtain for him had he requested such.

MR. DIRENFELD: Your Honor, we are going to renew the objection. The witness does not say, he says the record says so. We wish to object.

THE COURT: Yes, that part will be ordered stricken. The record speaks for itself.

Tell us what you know about it.

THE WITNESS: All right. At that point I asked him if there were any extenuating circumstances that he wished to submit. He stated no, he did not desire to say anything until the time of the trial. I then asked him, "Are there any witnesses that you want me to obtain for you to be present at the time of the trial?" He said no

that he would arrange that through his defense counsel. I then told him, or stated that "You may if you so desire submit a sworn written statement to be attached to this file at this time, giving any rebuttal to any of the statements that were attached to the file, any extenuating or mitigating circumstances, or relating any new evidence which wasn't in the file, or any evidence that he had on his own behalf." He stated that he did not desire to make a statement.

Q Is that the substance of the interview?

A Yes.

Q Among the papers which you showed him was there any statement by him?

A There was.

Q Did you have any conversation with respect to that statement?

A Yes, we—rather, I asked him if he recognized the statement that was attached to the CID report. He replied yes. I asked him if he had been advised of his rights under the 24th Article of War before making that statement. He said yes. I asked him if he had been offered any promises for making a statement of immunity or other wise. He stated no, he had not been offered any promises. He further stated that—No, I'll take that back. I then asked him if he had been coerced in any way or threatened in any way to make the statement, and he said no. I asked him if the statement was correct. He said yes. I asked him, "Do you want to make any additions to this statement at this time?" He stated no.

Q Lieutenant, I show you pencilled pages 83 and 84 of Respondent's Exhibit A and ask you if you recognize those two pages.

A This is a photostatic copy of the statement that I showed to Gusik during the interview.

Q And, whose statement is it?

A It is a statement of then the accused Gusik.

Q Statement of Thomas A. Gusik?

A Thomas A. Gusik, yes.

Q After this interview what did you do, if anything, with respect to the Petitioner?

A I told him that I would forward—

Q No, I said after the interview, what did you do, if anything?

A Oh, I see.

MR. DIRENFELD: I object. He started to answer the question as it exactly was.

THE COURT: Over-ruled. He may answer.

A After the interview I proceeded to Leghorn, Italy, to the court room and offices and talked to Lt. Burks. I told Burks—

MR. MORGENSTERN: Object, if the Court please.

THE COURT: Yes.

MR. MORGENSTERN: The objection, if the Court please, as to any conversation he had with Burks is self-serving on the part of the defense at this time. I have no expression at this time as to what I think of this prepared testimony as given by the witness. I will have something to say on this later. I think this is highly improper as to a conversation he had with Burks. This man was supposed to have been a witness who was not to be found.

THE COURT: The Court sustained your objection.

MR. MORGENSTERN: Pardon me.

THE COURT: He can tell what he did, but he cannot tell any conversation with Burks.

A. I told Lt. Burks—

Q Now, the Court sustained that objection. You can't tell what you told Lt. Burks. Did Lt. Burks report to you the following day?

A Yes, he did.

MR. DIRENFELD: Object, Your Honor. Leading the witness.

THE COURT: Yes, the question is suggestive and leading. Objection sustained.

COL. VOORHIS: No further questions.

MR. DIRENFELD: If Your Honor please, we should like to request a recess at this time to prepare for cross examination of the witness. As Your Honor understands,

we were not prepared to meet testimony and I should prefer, if it is agreeable to the Court, to recess until shortly after lunch.

THE COURT: If you intend to argue an hour and a half, you better not take that much time or you will not be heard today. The C: .t is not remaining here tonight.

MR. DIRENFELD: I appreciate that. May we have a recess?

THE COURT: Until two o'clock?

MR. DIRENFELD: Can we stop now and start at one instead of two, Your Honor, in view of the fact that we are now breaking at this particular time?

THE COURT: How much time will you need? Will you need an hour and a half?

MR. DIRENFELD: If Your Honor please, we will take a short recess now and then continue.

THE COURT: Is that agreeable to all parties?

MR. MORGENSTERN: That is all right.

THE COURT: The Court will recess for twenty minutes. If you need longer time advise the Court.

MR. DIRENFELD: Thank you, Your Honor.

FRIDAY AFTERNOON SESSION
January 7, 1948

THE COURT: Are you now ready to proceed?

MR. DIRENFELD: Yes, Your Honor.

CROSS EXAMINATION
By Mr. Direnfeld.

Q Lt. Calfee, would you please sign your name.

A (Witness signs name on paper.)

Q I think you stated this morning that you got out of the army. When?

A December 2, 1946.

Q You got out of the army December 2—

A 1947, I beg your pardon.

Q And you re-entered the army when?

A 21st day of July 1948.

Q And between December 2, 1947 and July 21, 1948 where were you residing?

A In Los Angeles, California, and Columbus, Georgia.

Q What was your occupation in Columbus, Georgia?

A I was on temporary duty, attending an officers training school.

Q Is that Fort Benning, Georgia?

A That's correct.

Q When were you there?

A From June 8 until sometime around July 21. I am not sure.

Q And, that was an army camp, is that right?

A That's correct, yes.

Q Now, during the time you were in Los Angeles, that was your usual residence, is that correct?

A Yes. At the time I resided in Los Angeles. Yes.

Q That's your usual address, is it not?

A Yes, it is.

Q And that is the address which you listed with the army upon your separation, is that right?

A Well, my address changed. It was Los Angeles all the time, though.

Q Did you use any other name during that time?

A No.

Q Now, when were you first contacted by the army as to being a witness in this particular case?

A I don't remember when I received the letter. I know it was dated October 7, 1948.

Q And, from whom did you receive the letter?

A The Judge Advocate General.

Q What was the request in the letter?

A It stated that I had been the pre-trial Investigating Officer in the case of Private Gusik and that I would

be contacted shortly by the U. S. Attorney at Los Angeles for the purpose of taking a deposition.

Q Did the U. S. Attorney at Los Angeles contact you?

A No, he didn't.

Q Have you received any further mail from the army relative to this case?

A I received—shortly thereafter I received a copy of my report of investigation.

Q And when was that?

A Oh, I believe it was dated the same date that the other correspondence, October 7. However, it was under separate cover and I don't think it was first class mail, so it didn't arrive the same date.

Q And that package had a copy of your report as Investigating Officer?

A That's correct.

Q Did it not also have a copy of other reports?

A It had a copy of the CID report which was a part of my report.

Q The CID report was also included in there, is that right?

A Yes.

Q Did it also include a copy of the Board of Review disposition of the case?

A No.

Q What else was in there besides the CID report and your report?

A I believe that was all that was in there. In fact, there were several enclosures missing.

Q Such as?

A Private Gusik's statement was one, and I believe the other one was a guard roster.

Q Now, when you say Private Gusik's statement, which statement are you referring to?

A The statement that was attached to the CID report.

Q Did you write and ask for it?

A No.

Q Pardon?

A No, I didn't.

Q Now, do you still have that CID report and your report in your possession?

A No.

Q What has been done with it?

A I turned it over to Col. Voorhis.

Q When?

A Yesterday.

Q But, you have had it continuously from October 7 to yesterday, is that right?

A That's correct.

Q In that letter that was sent to you, what did they tell you that they would expect you to testify to?

A They didn't.

Q Will you repeat again the general contents of that letter.

A That I had been the pre-trial Investigating Officer in the case of Private Gusik, who was charged with the 92nd Article of War, murder, that the U. S. Attorney at Los Angeles would contact me for the purpose of taking a deposition, and then they stated among other things he charged that I didn't perform my pre-trial investigation properly.

Q What was that last statement? Repeat that last part.

A I say, and it said among other things — I believe that's the wording that was used — that he was charging that I didn't perform my pre-trial investigation properly. In other words, I didn't give him all his rights. I don't remember the exact contents of the letter.

Q Did you talk to anybody about this case since you received that letter?

A Yes, I have.

Q And, with whom?

A Col. Voorhis.

Q When?

A Yesterday.

Q And, before yesterday?

A I have never talked to anyone about it, except there was—wait a minute, there was an American Legion representative from the Santa Barbara local post came to see me. However, I don't believe I discussed the investigation. I am not sure.

Q Now, did you hear Col. Windom say earlier that you had been studying that report for several days?

COL. WINDOM: I didn't say that.

A I didn't hear the time that was specified. I just took it that I had been studying it, which I had.

Q In other words, it is your testimony you haven't talked to anyone from the army or the District Attorney's office since October 7, is that right, except for yesterday's conference with Col. Voorhis?

A Outside— and in regards to this case, the only one I talked to, as I remember, is Col. Voorhis in regards to the case.

Q Where did you discuss that with him?

A In our hotel room.

Q What city?

A Columbus, Ohio.

Q And how long did you spend with Col. Voorhis?

A I don't remember. I can't tell you the exact time.

Q When did you arrive in Columbus?

A I arrived in Columbus Tuesday night, and I met Col. Voorhis about noon yesterday.

Q How long did you confer with him?

A Oh, I'll have to guess. Two hours, maybe three hours. I don't know if that was all conference. Most of it was reading.

Q Did he tell you what points he wanted to clear up in this case?

A No, not specifically.

Q What did he tell you your testimony would be?

A He didn't.

Q What did you discuss?

A We discussed— he asked me if I had performed these different things, what I said when I was with Private Gusik. Regular interrogation.

Q You knew that the CID agents had previously testified in this Court in this case, is that correct?

A Not from my own personal knowledge.

Q Well, you have learned, is that right?

A I read that in one of the records.

Q In the transcript record? Or, may I show it to you? I am showing the record in the District Court of the United States in this case. Was it a record like this where you saw the testimony of Urdinarrain and Whitmire?

A I can't say. I don't remember if it was there. I remember I saw it in a certain paper. I didn't pay too much attention to it.

Q Was it in question and answer form, such as this?

A I believe it was. I am not sure, I didn't pay too much attention to that.

Q Now, you read your own report quite thoroughly, did you not?

A I did.

Q Incidentally, who furnished you with a copy of the report of the CID agent's testimony that you reviewed?

A Will you repeat that.

THE COURT: Will you read the question.

THE REPORTER: Incidentally, who furnished you with a copy of the report of the CID agent's testimony that you reviewed?

A I don't understand.

Q You stated that you saw the testimony of the CID agents. Who furnished you with that information?

A I didn't say I seen the testimony. I said I seen that they had testified.

Q Who showed it to you?

A Col. Voorhis did.

Q When?

A That was yesterday.

Q Did you see the testimony of Private Gusik?

A Yes.

Q And the statements he made in this Court concerning your part in the investigation?

A Yes, the part concerning my part in the investigation. I didn't read all of it, just that part.

Q Do you know the age of Thomas Gusik?

A I think at the time of the trial he was 18. He'd be either 19 or 20.

Q Do you know whether he had any former convictions at the time you saw him?

A His records indicated that he had no prior convictions by court martial since he had been in military service.

Q What was your duty status at the time you were the Investigating Officer for this case?

A I was the Investigating Officer for Headquarters, Port of Leghorn, and Headquarters, Mtousa.

Q Did you have any other duties?

A I was the Assistant J A.

Q You were in the J A's office, is that right?

A That is correct.

Q And, by J A you mean Judge Advocate?

A That's correct.

Q And, does not the Judge Advocate's office handle the prosecution of cases?

A It does not.

Q What department handles it?

A The Trial Judge Advocate's office.

Q What is the distinction between Judge Advocate and Trial Judge Advocate?

A You have a Staff Judge Advocate who is responsible to the Commanding General over all justice procedures, and your Trial Judge Advocate is a part or a sub-section of your Staff Judge Advocate.

Q Are you not under the same Commanding Officer?

A Yes.

Q And, at that time you were making several investigations, were you not?

A Yes, I was making about four at that time.

Q At the same time, and yet you remember this one in more detail than any of the other three?

A No.

Q Do you remember the other three in as much detail as this one?

A I would if I refreshed my memory. I would, yes.

Q Now, as an officer you are familiar with Article of War 70, are you not?

A I am.

Q And, are you familiar with the provision that provides that an accused must be afforded a fair, thorough and impartial investigation, is that right?

A That's correct.

Q Now, what instructions do you have toward what a fair and impartial investigation constitutes; a fair, thorough investigation?

A What instructions do I have?

Q Did you have at that time?

A Well, our policy— is that what you are asking?

Q Not what instructions—Strike the question. What were your duties as an Investigating Officer?

A To investigate all investigations referred to me under Article of War 70.

Q What were you supposed to do specifically?

A Specifically?

Q Yes.

A Well, under Article of War 70 it provides — and naturally that is what we followed — that first of all you must be impartial.

Q Excuse me. Don't tell me what the A W provides; tell me what your duties were.

COL. VOORHIS: Object to the correction by counsel. He was answering the question.

COL. WINDOM: His duties are prescribed by the Article of War.

MR. DIRENFELD: I want to know what his duties were, not what he was supposed to be doing.

THE COURT: Overruled. He may answer.

Q Tell us what you are supposed to do.

A Specifically what I am supposed to do? Everything that is provided by Article of War 70?

Q Yes.

A Very well. First of all, I am to acquaint myself with the case through records that are forwarded to me by all sources from which they are gathered. Secondly, I afford the accused in the case a chance to look at those statements, submit any additional evidence, cross examine any of the witnesses or have me cross examine them for him, have me investigate any phase of that.

Q When you say "any phase"—

A Of the evidence.

Q You mean both favorable and unfavorable to the accused?

A Favorable and unfavorable, correct.

Q And, when you say "investigation" what do you mean by that?

A What do I mean by investigation?

Q Yes, do you interview them?

A No, not necessarily interview. That is one of the methods of investigation. Do you want a definition, is that what you want?

Q. No, tell me what you mean by investigating favorable and unfavorable evidence. You say it isn't necessarily to interview. What other methods do you use for investigating?

A Well, I should say I did myself, and it was a general rule with the investigation officers in our headquarters, that we investigated every part of the evidence that had been submitted, investigate any evidence that the accused wanted to submit.

Q Lieutenant, you still are not telling me what you mean by investigating. Do you go out and talk to the witnesses?

A Talk to witnesses; talk to people; find new documents and attach those; get new names, investigate those.

Q You said this morning you had a stenographer when you went to the guard house to see Private Gusik, is that right?

A Yes, sir, standard operating procedure.

Q Did you have anyone else with you?

A No.

Q Did you have anyone assist you in this investigation?

A No.

Q Tell me what the stenographer did.

A Wrote down the conversation between Private Gusik and myself.

Q Where are the notes of that conversation?

A They were destroyed after the case was finished.

Q Does the army have copies of that?

A No, I wasn't required to do that. I did that for a reference during the investigation.

Q What was the name of that stenographer?

A Mr. Porciello.

Q Was he an Italian civilian?

A He was an Italian civilian, that is correct.

Q Did he understand English?

A Yes.

Q Now, after you were appointed Investigating Officer did you discuss this case with anyone?

A Discuss it with anyone?

Q Yes.

A Yes, I imagine I—well, I can't give you the specific number of people, but I know I talked to most of the witnesses that were available and testified at the trial; talked to the CID; talked to the man's Commanding Officer; his first Sergeant; his friends that I knew of.

Q All right. You say you talked to all the witnesses in this case.

A Not all of them, no.

Q Which ones did you talk to?

A I'd have to have the list to tell you because I am not too good on pronouncing these Italian names or remembering these Italian names.

Q Let me ask you, did you interview all the witnesses who are listed in paragraph 3 of your report?

A There were two or three of these, I don't remember exactly who they were at the present time, that were not available. They had been transferred to the United

States or taken to parts unknown, or, you know, not reasonably available for me to question.

Q Do you know which were which; that is, which you talked to and which you did not?

A At the present time I don't recall.

Q I will ask you specifically, did you talk to Alessandri Alvaro?

A May I see that name, please?

Q No, do you know off hand whether or not you spoke to him?

A I can tell you by my report. I can't tell you off hand, no.

Q You have had this report since October 7, have you not?

A I have, but I haven't studied it.

Q Do you know whether or not you interviewed Adolfo Colombini?

A There is one way I can tell you and that's seeing their statements relating their names with the testimony they gave.

Q Well, do you have attached to your report statements that you took from witnesses?

A No.

Q Then, by the statements you mean the CID's statements?

A That is correct.

Q Do you know whether or not you interviewed Angelo Cellauro?

A I'll have to see his testimony or his statement to remember whether I did or not.

Q I show you the photostatic copy of Professor Del Carpio's statement and ask you if you interviewed him?

A Yes, I did.

Q And, did the Doctor tell you that there were different size bullets in the bodies of the deceased?

A No, he didn't.

Q Did you question him about that?

A Yes, I did.

Q Did you see the CID report which showed that the Doctor had so stated?

A Doctor didn't state that. The Doctor stated that there were holes of different sizes in the bodies of the deceased.

Q Did he not state it must be concluded that it was of different size calibers?

A In my conversation with him I tried to pin him down on that and he couldn't state definitely whether there were different sizes or not.

Q Did he not state "that we must conclude the fire arm used was a long one, most likely a war rifle"?

A He stated—that may be the translation given that—he stated a type of rifle, that's correct, or a cartridge.

Q Now, you knew from your knowledge, did you not, that the American guards were armed with carbines?

A Not to my personal knowledge, no.

Q Did you know from your own knowledge that the Italian guards were armed with rifles?

A They were armed with Italian carbines.

Q Which are similar to our rifles, is that right?

A No, they are similar to our carbines.

Q There seems to be some dispute between yourself and the CID on what the guns are like. Now, in view of that did you ask the Doctor for the bullet shells?

A There were no bullet shells.

Q Lt. Calfee, if I show you a transcript of the court martial where the Doctor introduced and offered the court martial body the shells that he removed from the bodies, would you change your statement?

A If that were true, yes. I asked the Professor for any shells. He said there were none.

Q I will show you page 27 of the army's record of trial before the General Court Martial Board, the testimony of the Doctor, and ask you to read beginning with the sentence "From."

A You want me to read it out loud?

Q Yes.

A "From the examination of these fragments, we could determine that the weapon was a long one and of a medium caliber. If the Court is interested, I have the pieces in the institute in Pisa. I have kept them at the disposal of the authorities."

Q Now, Lt. Calfee, you didn't look for any shells when the Doctor said he had them at the University, did you?

A I certainly did.

Q Do you suppose the Doctor was hiding them from you?

A Very often the Italian authorities would not turn over anything to us. They would turn them over only to the Questor, which is the Italian branch.

Q Isn't it a fact that the shells were not from American rifles but Italian made shells, and that's why you didn't use it?

A That is not true.

Q In your report did you mention anything about shells, bullets of different sizes, different holes?

A I mentioned the holes of entry and exit, I believe.

Q I hand you your report, paragraph 8. Will you relate the Doctor's testimony. Read it aloud, please.

A "Professor Idelaę Del Carpio, of the University of Pisa, will testify that in August 1947 he performed the post mortem on the bodies of Salvatore Montalbano and of an unidentified civilian known as "Il Moro di Brindisi". The autopsy revealed that both the men had died from gun shot wounds."

Q Is there anywhere in this report where you show the different size wounds?

A Only in his statement shows the size of it.

Q In his statement to the CID?

A That is correct.

Q And, you had that before you?

A Yes.

Q And, you did not include it in your report?

A Certainly. I included the CID examination in

my report.

Q Do you call that a fair, thorough and impartial investigation to omit those facts?

A Omit what facts?

Q That there were larger size holes in the bodies?

A Well, I am not.

Q Yes, or no, in your opinion.

A I don't desire to answer yes or no.

THE COURT: You may answer and explain if you so desire.

THE WITNESS: I am not an expert. However, from experience I know that a bullet by its route of entry, whether it ricocheted or not, will determine the size of the hole on entry and leaving the body.

Q And in your opinion, is that fair and impartial to suppress such a thing from your report?

COL. VOORHIS: Object, Your Honor.

COL. WINDOM: It is not suppressed. It is in the report and he just told you so.

MR. DIRENFELD: Your Honor—

COL. WINDOM: Let me say my piece. It is attached as an exhibit to the CID report. It is attached to the report of investigation and therefore is not suppressed.

MR. DIRENFELD: If Your Honor please, the CID report was in his hands before he went out to see these people. He so testified this morning. We want him to be honest and include everything, those favorable as well as unfavorable.

THE COURT: The use of the word "suppress" may be objectionable.

MR. DIRENFELD: I will rephrase it.

THE COURT: Objection sustained to the question.

Q Did you talk to Private Parker?

A I did.

Q Did he not sign a statement that he had invited the thieves into the depot that night?

A Now, I am not saying that he invited them in that

night because I don't remember. There were several dates that Private Parker invited thieves into the depot referred to.

Q If I show you the CID statement—you saw that, did you not?

A Yes, I did.

Q —where Parker stated he invited him to the depot that night. Did you include that in your report; that fact?

A That he invited—?

Q In the report you wrote, did you state that Parker had made a statement inviting these thieves into the compound?

A If Parker made such a statement it will be in the report.

Q You have had this since October 7, have you not?

A Yes.

Q Do you know whether or not in your report you stated anything concerning Parker's invitation to these thieves? I show you your report and I ask you where you show any comment about your interview with Private Parker?

A I can't tell you the exact conversation that went on.

Q No, you haven't answered the question.

MR. DIRENFELD: Will you repeat the question.

THE REPORTER: Do you know whether or not in your report you stated anything concerning Parker's invitation to these thieves? I show you your report and I ask you where you show any comment about your interview with Private Parker?

THE WITNESS: That wasn't—

COL. VOORHIS: If it please the Court, there are two questions there. Which one does he want answered?

MR. DIRENFELD: I want answered, is there any where in your report that shows your interview with Private Parker?

THE WITNESS: No, it isn't required in my report.

Q Then why do you list the others if Parker's wasn't required? Why do you list five or six other witnesses' testimony, expected testimony?

A Now, straighten yourself out and ask me a direct question on what you want to know.

Q I want to know whether or not Parker's was in here, and if it was not required why the other statements were required.

COL. WINDOM: Object to that question.

THE COURT: Over-ruled.

THE WITNESS: I still don't understand what you want.

Q You have nine paragraphs here. Each one lists the expected testimony from each witness, is that correct?

A Yes, that's correct.

Q Parker's is omitted, is that correct?

A That's correct.

Q Is there any particular reason why Parker's was omitted?

A I don't remember why that was omitted.

Q You talked to a Private Hoy, did you not?

A Private who?

Q Hoy.

A Hoy. What is his entire name, please?

Q Charles Hoy.

A Charles Hoy. I can relate names with testimony. I just cannot relate names if I didn't have too much to do with them.

Q Do you remember seeing the statement of Charles Hoy in the CID report?

A I'll have to—

Q I will refresh your memory. His was the statement to the CID that he had deals with these thieves in connection with Parker. Did you interview that witness?

A There were about fifteen that gave such testimony not related to this case, during a very short time.

Q Lieutenant, I hand you your report again and ask you if you have anything in this report concerning the expected testimony of Private Hoy.

A No, I don't.

Q I think you stated you did read the entire CID report and had it with you when you started your investigation, is that correct?

A That's correct.

Q But, you did not interview Hoy?

A No, I don't believe—not in relation to this case.

Q I'll ask you if you interviewed Angelo Cellauro?

A What was the substance of his testimony?

Q His testimony was that there had been shots fired from the outside upon the accused and that he, Cellauro, had also fired at the thieves. That is in the CID report. Did you interview that witness?

A Well, I'll have to have more than that to remember.

Q (Showing the witness transcript) Does your report show any interview?

A No, it doesn't.

Q I will ask you if you interviewed Vitetta Antonio Di Francisco, whose testimony was that there were several people firing in the dark at the same time?

A (No response.)

Q I will hand you copy of your report and ask you if the testimony of that witness is included?

A What was his name, again; his full name?

MR. DIRENFELD: Read the question.

(Reporter read the question.)

THE WITNESS: How do you spell that name you are referring to?

Q Di Francisco.

A Is that his last name?

Q Yes.

A Di Francisco means that is his mother's name.

Q Vitetta Antonio.

A (No response.)

Q Does your report indicate anything for that person?

A Yes, it does.

Q And, what does it show? Does it show anything in there about other persons firing into the dark at silhouettes?

A (No response.)

Q I am asking you about your report now, Lieutenant; your report.

A This is also a part of my report.

Q The CID investigation?

A That's correct.

Q Did you perform those, or are those signed by Urdinarrain? That was completed before you started the investigation, was it not?

A That is correct.

Q I want the report you made and signed right here.

A You mean—

Q As Investigating Officer.

A A summary of expected testimony, that's right.

COL. VOORHIS: We object. If Your Honor please, he has testified several times that his report included all these attachments, and the attachments being these various statements that he is now being questioned about. The witness says that is part of his report.

MR. DIRENFELD: Now, if Your Honor please, I don't want to stop to argue the law at this particular time, but Article of War 70 provides there shall be a fair, impartial and thorough investigation. This is exclusive and completely separate from the CID investigation. If both are one and the same, what is the purpose of AW 70? No matter how many times the CID investigated there still must be an Investigating Officer appointed and a fair, impartial, thorough investigation made by him. Is that correct, Colonel?

COL. VOORHIS: The issue now is that this is the witness who made a report and he is telling us on the witness stand what was in his report, and he says these statements were a part of his report.

MR. DIRENFELD: He has testified he did not take those statements. Those were taken by the CID.

COL. VOORHIS: All right. They are part of his report. He says so and he is the witness.

THE COURT: He may answer is he knows. He was the Investigating Officer, was he not?

COL. VOORHIS: Yes, sir.

Q Does it show in your report?

A Does what show in my report?

Q Any comment about the witness I have just mentioned as to he and others firing at silhouettes. I want from the report that you turned in to your appointing officer signed by you. These three pages here.

A You mean from the summary?

COL. VOORHIS: If Your Honor please, he can't tell him what part of his report to look in.

THE COURT: He can tell as to what he reported, can he not?

COL. VOORHIS: I mean counsel.

THE COURT: If I understand the question propounded by counsel, it is as to whether or not he included this in his report to his Commanding Officer.

COL. VOORHIS: And the witness says to these two or three pages summary statement he attached all these exhibits and they are a part of his report.

THE COURT: Can he not answer if he included them?

COL. VOORHIS: Counsel won't let him get beyond those first three pages.

THE COURT: Oh, yes, we will see that counsel does get beyond that. He may answer and explain if he so desires.

THE WITNESS: On Article of War 70—first of all I want to clarify this. I am not required to duplicate work done by the CID.

MR. DIRENFELD: I move that be stricken from the record. I am asking you only concerning this statement. Does it show that he fired at silhouettes in your report. That is the question.

THE COURT: Now, you may answer that question,

Lieutenant, and explain your answer if you desire to do so. Do you understand the question.

THE WITNESS: Yes, these men were interrogated as a group.

Q By whom?

A Myself and an interpreter.

Q Do you have copies of their statements?

THE COURT: Just a moment. Let the witness finish his answer.

A They made oral statements to me, verifying the CID statements, and they were all asked if they had anything they wished to add and were questioned to find out if there was any additional evidence.

Q I'll repeat, Lieutenant. In your summary to your appointing officer, did you include the testimony of the witness I have previously mentioned?

A (No response.)

Q If Your Honor please, I think we can get a yes or no.

THE COURT: Just a moment. Give the witness a chance to answer. Quite a lot of time has elapsed since this man was on the job over in Italy.

A I can only make this statement, that the testimony given to the CID was gone over with the man when I had these men in a group from the Italian army.

THE COURT: Now, Lieutenant, he has asked you whether or not you included this summary in your report. Did you or did you not?

THE WITNESS: Yes, Your Honor.

THE COURT: If you know.

THE WITNESS: Yes, I did.

Q Will you show it to me.

A You mean a summary of their evidence?

Q Expected testimony, that's right.

A That's a sort of a yes and no answer.

THE COURT: You may answer and explain.

Q If the answer is yes show it to me.

A Well, part of your question yes, part of it no.

"Shortly thereafter they heard shots and saw civilians being hit by the gun fire, who fell to the ground."

Q Does it show anywhere where civilians fired in at the army personnel?

A I would have to go and screen each one of their statements.

Q In the summary?

A No, not in the summary.

Q All right. Lieutenant, is there any particular reason why you listed the summary of the expected testimony of the nine witnesses, but omitted the summary of Private Parker, Private Hoy, the two [redacted]ans who said that the army personnel had been fired upon first and that they fired also? Is there any particular reason why those four are omitted?

A Take them one at a time.

Q Yes, why was Private Parker's statement omitted?

A It probably wasn't known at the time that that investigation was performed, or it was not included and forwarded to me.

Q Did your not state that you had the CID report before you began the investigation?

A I did, yes.

Q And the exhibit is in this Court showing Private Parker's statement in that report before you started.

A It may be true, but still the statement may not have been there. It may list it as an enclosure.

Q Is there any reason why you omitted to interview Private Hoy?

A Omitted to interview Private Hoy?

Q Yes, you stated you did not interview him.

A Well, I don't recall. I remember, though, that all witnesses concerned that could be found were questioned.

Q Well, Lieutenant, is it coincidental that your report does not show any shots from outside to the inside?

A There was no—

Q There was no intent to suppress favorable evidence to the accused, was there?

A No. You must remember this, that in his own statement the accused stated that—

Q Now, just a minute. I am asking you about witnesses that you interviewed. We will get to him. Is there a y reason why the Italian statements were omitted from yo r summary?

A That—now, I want to clarify this. This summary is not absolutely required. It is a short summary of evidence and absolutely required. It is a short summary of evidence and included in there is no hearsay. We try to eliminate everything that won't be testified to.

Q Now, Lieutenant, tell me this. If that is so, it really is not necessary for an investigating officer to talk to a single person. He could merely turn in the CID report, could he not?

A No.

Q What is the investigating officer required to do if the CID report is his report?

A To afford the accused his rights.

Q Is he not—

A Not to perform a criminal investigation.

Q True, and is he not also to interview witnesses for and against the accused?

A That is correct.

Q And to report that to the appointing officer, is that correct?

A Yes. If I— well, I mean if he goes up to a—

Q Lieutenant, are you to report both favorable and unfavorable matter to your appointing officer?

A That is correct.

Q But you did not list these four in the report signed by you, is that correct?

A Well, it's very evident that I didn't.

Q That's right. How long did this entire investigation take you?

A Well, I had it in my possession about seven or eight days.

Q Did it take you seven or eight days to complete this investigation?

A It took part of that tmie.

Q You testified this morning you were appointed on what day?

A Sometime between the 18th and 25th, I believe.

Q You said this morning that's when you performed the investigation. When were you appointed?

A The 18th of September 1947.

Q Do you know what time of day you got notification of it?

A No, I wouldn't remember that.

Q Morning or afternoon?

A I wouldn't remember that.

Q Who notified you?

A No one notified me.

Q How did you become the investigating Officer?

A It was sent to me by letter in an envelope.

Q Who sent it to you?

A I believe— do you want the individual or by the command of someone? By the Commanding Officer or General of the Port of Leghorn.

Q How long does it take for matters to get from the Commanding General to you?

A Sometimes twenty minutes; sometimes three or four days.

Q Did you know that the shooting had previously been held to be one of justifiable homicide?

A According to the Commanding Officer, yes.

Q The Commanding Officer had held this to be justifiable homicide, had he not?

A That's correct.

Q You were aware of that?

A Yes.

Q And he was also thereafter restored to duty, is that correct?

A It's all hearsay. That's what his Company Commander told me.

Q I see. Did you talk to the CID agents? I believe you said you did, did you not?

A Yes.

Q Which ones?

A Strano and Urdinarrain. They was the only two on this case.

Q Wasn't there a Sergeant Whitmire?

A I didn't talk with Whitmire.

Q And, did you discuss the statement that they had taken with them?

A With them?

Q Yes.

A Yes.

Q And, did you learn by your investigation how long Gusik had been held without charges being brought against him?

A Yes.

Q How long?

A I affirmed the date that he was committed to the DTC by him at the DTC at the time of the first interview.

Q And, how long was he confined before charges were brought?

A I don't recall exactly.

Q The record shows and the CID agents testified here that he was held eighteen days without charges being brought against him. Are you familiar with the section of AW 70 that provides a person must not be held more than eight days without charges?

COL. WINDOM: We object. This witness did not hold him. He was held by the Commanding General of the Port of Leghorn.

MR. DIRENFELD: As investigating officer I want to find out if he knew that.

THE COURT: The objection is over-ruled. He is merely asking if he is familiar with the regulation.

A Yes.

Q And, you were also aware that he was there more than eight days before you served him with a charge sheet, is that right?

A I read it on the bottom of the charge sheet when I got it.

A The date he was confined.

Q That's right, and it was more than eight days?

A Yes.

Q Did you make any mention of that in your report to your appointing officer?

A I was not required to.

MR. DIRENFELD: I move the answer be stricken, Your Honor. It is not responsive.

THE COURT: You will answer the question if you are able to do so. Read the question.

THE WITNESS: No, I understand it. No.

Q You did not?

A No.

Q Do you think that that was commensurate with a fair, impartial and thorough investigation?

THE COURT: What is the difference what he thinks about it? The Court will do the thinking in the end, based upon the facts as they are developed in the case.

Q Did you see the first two statements that were made by the accused?

A No, I didn't.

Q But your investigation revealed that he had made two previous statements, is that correct?

A There was a statement brought into the office later. It was a small statement containing about a paragraph, a statement he had made to the Commanding Officer, or something like that.

Q And what was the gist of that statement? In short, Lieutenant, was it not a denial?

A No, it was not a denial.

Q Tell us what it was?

A It was a statement, I think—I think it was one taken by his Commanding Officer to attach to the line of duty shooting.

Q And, it was upon that statement that the Com-

manding Officer held it a justifiable homicide, is that correct?

A I don't know. I can't say that.

Q Did you include in your report to your appointing officer the fact that this man had made at least one or two previous statements?

A We were only aware of the one.

Q Did you report that to your appointing officer?

A Did I report—

Q In your investigating officer's report did you include that fact?

A I told you that fact came up later.

Q After you completed your investigation?

A That's correct.

Q And, after you submitted your report?

A That's correct.

Q Did you amend your report to show that?

A I cannot amend my report unless it is referred back to me for investigation a second time.

Q In other words, if you learn of some evidence subsequent to the submitting of your report, there is nothing you can do about it, is that what you are conveying?

A I can give it to the Trial Judge Advocate or the defense counsel.

Q But not to the appointing authority?

A I can.

Q But, you didn't?

A I didn't. It was not consequential.

Q Did you report to your appointing officer that the shooting had previously been held a justifiable homicide?

A That was determined prior to it coming to me.

Q That's right. Had you reported it in your report to the appointing authority?

A In this report?

Q That's right.

A I reported the evidence that was submitted.

MR. DIRENFELD: I move the answer be stricken.

THE COURT: Read the question.

(Reporter read the question.)

THE COURT: Do you understand the question?

THE WITNESS: Yes.

THE COURT: You may answer.

MR. DIRENFELD: Lieutenant, yes or no and then explain.

THE COURT: Just a moment. Let the witness answer.

THE WITNESS: In this case—

THE COURT: No, answer and explain if you desire. Did you or did you not make such a report, if you know?

THE WITNESS: No, I didn't.

THE COURT: You may explain if you desire.

THE WITNESS: All right, because this was—the investigation was actually a continuous thing, first taken up by the man's Company Commander and later turned over to the CID, and therefore his Commanding Officer was assuming something without this other evidence.

Q I have read to you the portion of the Doctor's testimony at the court martial trial where he offered the bullets to the court martial body. Don't you feel that in view of his testimony of the type of rifle, type of bullets, type of holes, a ballistics test should have been made?

COL. VOORHIS: If Your Honor please, "doesn't he feel"—

THE COURT: Now, that is another matter perhaps the Court will have to determine in determining whether or not this party has had a fair and impartial trial, a trial which did not violate his constitutional rights. Objection sustained.

Q Now, you stated this morning that you explained to Gusik his rights under the 70th Article of War. What are those rights?

A I testified to them. Do you want me to tell you those again?

Q Yes.

A Well, he's entitled to an impartial investigation by an impartial officer appointed by the appointing authority of the Commanding General having jurisdiction.

Q And, is that what you explained to him?

A No.

Q What rights did you explain to him under the 70th Article of War?

A I explained to him that I was Lt. Calfee. You want exactly what I said to him?

Q I want to know what rights you explained to him under the 70th Article of War. Confine yourself to the 70th Article.

A That's what I am doing. First of all I told him that he could cross examine or examine any of the witnesses against him, listed against him on the front of the charge sheet, or any of the witnesses listed for him, if there were any.

Q Now, Lieutenant, I will ask you if there is anywhere in the 70th Article of War which was in effect at that time—

A Just before I answer that, I want to specify. I didn't complete my last answer.

Q Excuse me. Go right ahead.

A Secondly, that I would cross examine or examine any witness that he desired. I told him of his right to present evidence in his own behalf, to be represented by counsel.

Q Now, I will ask you when you say you showed the statements—

THE COURT: Have you completed your statement, Lieutenant? Had you finished your answer?

THE WITNESS: Yes, the general answer.

Q When you showed him the statements did you show him a statement from Private Hoy, a man you didn't interview?

A No.

Q You didn't show him the statement of the two

Italians who testified that there had been gun fire from outside the compound inward?

A What Italians?

Q The two that we have just discussed earlier.

A The Italian soldiers?

Q That's right.

A Yes, I read him their statements.

Q How long did the interview take with Gusik?

A I don't remember now, but I can tell you what an interview would usually take, but I can't tell you exactly in this case.

Q Tell me exactly in this case. How long did you talk to Gusik?

A I can't tell you exactly, approximately.

Q Would you say a day, two days, a half hour, ten minutes, two minutes?

A Between one and two hours.

Q Between one and two hours?

A Yes.

Q Do you remember what time of day it was?

A No.

Q Morning, afternoon?

A I don't even remember the exact date. I can tell you it was a certain length of time.

Q It might have only been a half hour, and on the other hand, it might have been three or four hours?

A No, it would have been at least an hour.

Q And, approximately how many statements did you read to him?

A All the statements that were attached to the file.

Q I think there are, roughly, about twenty statements.

A There may be that many enclosures, yes. I don't believe they are all statements. Some of them are just enclosures, pictures and other things.

Q Did you show him any documents?

A I showed him a guard roster, which is a document.

Q Anything else?

A Several photographs that were taken and a map of the depot concerned there.

Q And, you advised him of all these rights under the 24th Article of War, 70th Article of War, explained your mission, explained his right to defense counsel, you did all that within about an hour?

A I don't say exactly an hour. I'd say between one to two hours. Maybe it was three, but it was at least an hour.

Q Lieutenant, you asked him about extenuating or mitigating circumstances. What do you mean by those terms?

A As you have mentioned before, there is a possibility that it was in the line of duty and he may have some mitigating circumstances along that line or any other evidence that he had not revealed in his own behalf that might have affected the case.

Q But, you didn't tell him of the mitigating circumstance, the statement of Hoy and Parker, did you?

A Well, if they weren't attached to my file, I didn't know.

COL. WINDOM: Pardon me. Would you give me the page reference to Hoy's statement that you are referring to?

THE COURT: At this time the Court will take a ten minute recess.

— Short Recess —

COL. WINDOM: Your Honor, just prior to the recess I asked counsel to furnish the reference in the record of the statement of this man Hoy repeatedly referred to. The Respondent would like to renew that request.

MR. DIRENFELD: Your Honor, we have been unable to find it within the file of Exhibit A before us. I wish to state that at the time we appeared in Washington before the Board of Review, I personally observed the statement. I wish to further state that the CID agents who previously testified in this Court testified that they

did interview Private Hoy, and that the matter as set forth here is borne out in the record, although I do not see the statement of Hoy. However, there is a statement here of Private Parker in the presence of Private Hoy.

COL. WINDOM: On the basis of that statement, the Government moves to strike from the record those portions of questions and answers relating to any statement of Private Hoy which is alleged to have been in the possession of Lt. Calfee.

MR. DIRENFELD: We object, Your Honor, inasmuch as the CID agents stated that they had interviewed him. More so, this witness has testified that he discussed it with the CID agents. More so, this man is obliged to make an independent, impartial, thorough investigation. That surely should have been one of the witnesses to interview. His job is independent of the CID.

COL. WINDOM: The answer to that, Your Honor, is this. Here is the list of enclosures and the documents Your Honor has already admitted into evidence. No place in there does the name Hoy appear that I am able to find, and counsel and I have gone over it together, with one exception. Hoy was a witness, present when Parker made his statement. That is the only thing we are able to find. Now, to have this witness questioned on the theory that he had in his possession a statement of Hoy, when the official record refutes it, I think is unfair to the witness. Parker's statement is in here. I make no objection to that.

MR. DIRENFELD: If Your Honor please, as we repeated before, he has discussed it wtih the CID and the CID has testified here that they had interviewed him, and the matters that we brought out here—

THE COURT: Will you point out the testimony which bears out the statement which you have just made.

MR. DIRENFELD: Yes, Your Honor.

THE COURT: In order to expedite the matter and save time, the Court will reserve a ruling on the motion made by Col. Windom, and will request counsel to point

out the page or pages of the record which support the statement you have just made.

MR. DIRENFELD: Thank you.

Q Lieutenant, I want to get one point clear. Was your investigation limited to the persons whose statements had been taken by the CID?

A No.

Q Had you interviewed persons other than those listed in the CID report?

A Yes.

Q Who?

A I can't tell you by name. The man's Commander, several soldiers who were in his company.

Q Now, I think you testified before that you did not interview every witness whose statement was taken by the CID, is that correct?

A That's correct.

Q Now, I hand you Manual for Court Martial and ask you to read the first sentence under Article of War 70 aloud.

A "Charges and specifications must be signed by a person subject to military law and under oath, either that he has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact to the best of his knowledge and belief."

Q Did you have personal knowledge of all the matters?

A That refers to the accuser, not to me.

Q You stated that you had this report about eight days, is that right?

A Yes.

Q I am going to hand you War Department Technical Manual 27-255 entitled "Military Justice Procedure", and on page 37 thereof, Section 43, I will ask you to read the first sentence.

A "Since—

Q Just a moment.

A "43. Investigation Proper. A. Since in the ab-

sence of satisfactory reason the report of investigation must be completed within forty-eight hours, immediate steps must be taken to arrange a time and place for the investigation at which the accused and all available witnesses will be present."

Q Was that done, Lieutenant?

A Was what done?

Q Was the investigation completed within forty-eight hours?

A No.

Q Were immediate steps taken to arrange a time and place in which all available witnesses and the accused were brought together?

A The accused did not desire to exercise his right to interrogate witnesses. Therefore, that was not required.

Q Now, Lieutenant, I am asking you the question. Did you arrange a time and place wherein the witnesses and the accused were present?

A No.

Q All right. Did you ever see this manual before?

A Certainly.

Q You are familiar with that section?

A Yes, I am.

Q You testified this morning that under Article of War 70 you gave the accused—Strike that. I think you said it was the standard operating procedure to afford them defense counsel at the pre-trial investigation, is that correct?

A Yes.

Q Now, Lieutenant, you are under oath, you appreciate that?

A I understand that.

Q All right. You testified to that?

A I testified to that, yes.

Q And, do you have a copy of the order from any authority stating to that effect?

A To the effect that the accused may have a regular appointed defense counsel?

Q At the time of the pre-trial investigation.

A At the time of the pre-trial investigation if he so desires? No.

Q Upon what basis do you claim here that you afforded him this extra legal protection?

A On the basis of the standing operating procedure of our headquarters.

Q Do you have the number of that?

A It was a memorandum.

Q Signed by whom?

A I don't remember.

Q Do you know that the law has since been amended and that is the provision today?

COL. WINDOM: Object.

MR. DIRENFELD: But it was not at that time.

COL. VOORHIS: If Your Honor please, it is not the provision today.

THE COURT: Yes, sustained.

Q Do you know that that very particular issue was raised in Congressional Committee?

COL. WINDOM: Object.

THE COURT: What does that have to do with this case?

MR. DIRENFELD: I want to show the Government has always opposed such a provision.

THE COURT: You can argue that to the Court, but this witness is not chargeable with what the Congressional Committees do or do not do. They are not supposed to have knowledge, I assume, of everything that goes on before Congressional Committees. Objection sustained.

Q At the time that you discussed defense counsel with him, whom did he say he wanted to represent him?

A I named the officers that I prior named in the record, and he stated of those Lt. Burks.

Q Lt. Burks?

A Yes.
Q Did the accused state that he knew Lt. Burks?
A I don't recall if he did or not.
Q Did he say he had ever seen Lt. Burks?
A No, he didn't say.
Q Upon what basis, if you know, was that selection made?
A Do you want what I believe?
Q Do you know on what basis?
A No, I don't. I can assume.
Q You don't know whether he knows him or not?
A No.
Q Do you know Lt. Burks?
A Yes.
Q Did you ever see him?
A Yes.
Q Describe him.
A About five foot six inches, weighs about 165 pounds, has a small mustache, mulatto complexion, distinct features, usually dressed in an Eisenhower Jacket.
THE COURT: What does that have to do with this case, what kind of a looking fellow Lt. Burks is?
MR. DIRENFELD: I am getting at the selection of counsel.
Q Is there not a place on the report of the investigating officer for setting forth the counsel requested by the accused?
A There is no such place provided.
Q Do not the Articles of War provide that an accused has a right to select counsel of his own choice?
A For what, the investigation of trial?
Q For the trial?
A I believe the way it is worded, "if counsel is reasonably available he will have counsel of his own choice."
Q And, who appoints counsel?
A The Commanding General having General Court Martial jurisdiction.

Q How does the Commanding General through normal operations find out what the accused's choice is?

A By a letter instigated by the accused. In our particular theatre the defense counsel included that on a buck slip if it was required.

Q Lieutenant, is it not a provision of Article of War 24 that an officer to whom the request is made will forward that?

A Not under Article 24, no. Another article. I don't know what the article is. I am not sure. Look under Defense Counsel, General Court Martial.

COL. VOORHIS: The Article of War with respect to defense counsel is Article of War 17, and the provision you have just purported to quote does not appear in it.

MR. DIRENFELD: Yes, I think Section 45, the General Court Martial, provides—

COL. VOORHIS: Of the Court Martial Manual?

MR. DIRENFELD: The Court Martial Manual:

"Application through the usual channels for the detail of a person selected by the accused as counsel may be made by the accused or anyone on his behalf. When the application reaches an officer who is authorized to make the detail and order any necessary travel, he will act thereon." And, I think under the 70th Article of War there are instructions as to his right to have counsel of his own choice, is that correct?

COL. VOORHIS: If Your Honor please, we can all read the Article of War. Are we supposed to rely on the memory of this witness as to what a statute provides?

MR. DIRENFELD: He should be familiar with it.

Q What I want to know, Lieutenant—withdraw the other question—did you in your report make any annotation of request for counsel by the defendant?

A In my report?

Q Yes.

A Not in my report of pre-trial investigation, no.

Q Is it not the usual procedure to forward such information in your report?

A No, not in the report.

Q Now, you asked him who he wants for defense counsel and cited the names of four of them?

A The regular appointed defense counsels for the pre-trial. I asked him if he wanted one of them for his pre-trial investigation and then at the time of the trial, you understand that.

Q And, you claim he picked out one of them?

A He picked out Lt. Burks.

Q Do you know Lt. Ryan?

A No.

Q Do you know whether or not he was an officer on the base?

A I don't know.

Q Isn't it a matter of fact that the accused, Gusik, asked to be represented by Lt. Ryan?

A I can only answer that in one way, that if he made such a request it would be attached to the allied papers of the record of the trial.

Q How would it get there?

A Placed there by the Staff Judge Advocate.

Q Tell me how the Staff Judge Advocate would know of his request if you did not pass on his request.

A He wouldn't know it if I didn't pass it on.

Q In other words, if he made a request for counsel, as you contend, it was your obligation to pass that on, is that correct?

A Yes.

Q But you did not?

A I did.

Q In your report?

A I wasn't required to in my report.

Q Isn't it a fact, Lieutenant, that Gusik denied the statement that was in the CID file?

A No, he didn't deny it. He affirmed it.

Q Isn't it a fact he denied portions of the statement and told you of coercion?

A He did not.

Q But, yet, you asked him about coercion, is that correct?

A I did.

Q You knew he was held more than eight days?

A Yes.

Q You claim he made no denial, but you asked him about coercion?

A I always did, yes.

Q Now, how many charges and specifications were there on this?

A One charge and two specifications.

Q Actually, in effect, Lieutenant, your investigation in the main consisted of an interview of the accused and accompanying therewith, the report of the CID, isn't that correct?

A That's incorrect?

Q Is it in your mind that the CID is part of your investigation?

A Will you make that statement again.

Q Is the CID report part of your investigation?

A It is, yes.

Q Even in the instance where you did not interview the people?

A Yes, even in the instance where I did not interview the people.

MR. DIRENFELD: That will be all.

THE COURT: You are excused, Lieutenant.

MR. DIRENFELD: At this time we would like to cite to the Court page 214 of the transcript in reference to Hoy that the Court inquired about before. Urdinarrain on cross examination testified that Parker had gone AWOL, and that I think Private Hoy went AWOL, too.

"Q And, these Italian witnesses whom you interviewed told you on occasions where they paid Hoy 80,000 Lira to come into the Depot, is that correct?

A Yes, sir.

Q And, they had let them in the depot, is that correct?

A Yes, sir.

Q And, these witnesses told you that they came out to the Depot at the invitation of Bobby and Parker, is that right?

A Yes, sir.

Q And, that they had been in the Depot that night and had been routed when the OD came, is that correct?

A Yes, sir.

Q Now, did you investigate Private Hoy's deposit in Leghorn?

A Yes, sir.

Q Did you find it to be something like 8,000,000 Lira.

A No, sir:

Q What was it?

A We didn't find any mony on Hoy."

It goes on to describe the girl friend's name.

COL. WINDOM: I renew the motion, Your Honor. The allegation here, the inferences, all the questions were based upon the fact that Lt. Calfee had in his possession at the time of his pre-trial investigation a statement of Hoy. Now, Exhibit A, 1, or however, it is denominated, contains no statement of Hoy attached either to Lt. Calfee's report or Lt. Urdinarrain's report. In other words, we don't dispute this, but that was not the basis of the questions. Therefore, I think in fairness to this witness the questions should go out.

MR. DIRENFELD: If Your Honor please, it was stated this morning by counsel of the Government that it was their aim in bringing this witness to rebut the fact that this man did not perform his duties as set forth by Article of War 70, to conduct a fair, impartial and thorough investigation. We claim that every bit of the testimony here on cross examination went to that issue, and as to whether he interviewed Hoy or not, as to what he found or not, goes to the issue whether it was fair, impartial and thorough.

COL. WINDOM: Yes, but he has misrepresented the facts to this witness.

THE COURT: If I understand your objection, Col. Windom, it is based upon the form of the questions propounded to the witness.

COL. WINDOM: It is based upon a mis-representation of the facts as to the record.

THE COURT: As to the existence of a statement from Hoy?

COL. WINDOM: That's right.

THE COURT: The Court will examine the record and reserve a ruling on the motion to strike the testimony. Do you have anything further to offer?

COL. VOORHIS: The Respondent does not.

THE COURT: Does the Petitioner have anything further to offer?

MR. MORGENSTERN: We will put Thomas Gusik on the witness stand, Your Honor.

Thomas Gusik,

the Petitioner, recalled in his own behalf, in sur-rebuttal, having previously been sworn, testified as follows:

Examined by Mr. Morgenstern.

Q Thomas Gusik, you were present in Court when the witness testified—

COL. WINDOM: Pardon me until we ask Lt. Calfee to step out in the hall.

Q —when the witness, Calfee, testified and just left the stand? You were here throughout his entire testimony, is that correct?

A Yes.

Q Will you relate whether or not you had seen or talked with Lt. Calfee?

A No, I doubt it very much.

Q Did you talk with an investigating officer?

A Yes.

Q About when was that?

A Sometime in the middle of September 1947.

Q Where were you stationed?

A At the DTC in Pisa, Italy.

Q By that you mean the Displinary Training Center, is that right?

A That's right.

Q This person that came in to talk to you—will you describe him.

A He stood about six foot one, medium build, GI haircut, was a First Lieutenant.

Q Can you tell us the date that he was there?

A No, I can't.

Q Would you say that it was about the 25th day of December 1947?

A It's around there. I wouldn't say it was exactly.

Q Now, this officer, or this Lieutenant who came there, what did he tell you?

A Well, he introduced himself and told me he was my investigating officer.

COL. VOORHIS: If Your Honor please, I object to this evidence. It has nothing to do with this case.

THE COURT: What is the purpose of this testimony?

MR. MORGENSTERN: The purpose, if the Court please, is to rebut whatever evidence is being submitted that he was advised of his rights, that he was advised with reference to his rights for counsel, for subpoening witnesses or cross examining witnesses.

THE COURT: Has he not already testified as to what was done?

MR. MORGENSTERN: Yes, Your Honor, he has, but this evidence here is in rebuttal to the new evidence or new testimony brought in on the part of the Government, and I believe that we have a right to indicate whom he requested for counsel, which is in evidence that is

true, Your Honor. We have a right to indicate that these statements which were made to him were not made. In other words, rebutting the testimony of the previous witness, if he was the man.

THE COURT: Why not go directly to the point without bringing in other characters until it is necessary.

MR. MORGENSTERN: All right, Your Honor, I will proceed on that.

Q Now, was the 92nd Article of War read to you?

A Yes, it was.

Q What was stated to you with reference to the 92nd Article of War?

COL. WINDOM: By whom and when?

Q By whom was it read?

A The investigating officer read me the 92nd Article of War and told me I was charged with murder; the minimum sentence was freedom and the maximum was rope, by that he meant by hanging.

Q You are talking a little bit fast. The minimum sentence was freedom—

COL. WINDOM: Object, Your Honor, for this reason. I may be wrong about this. Mr. Morgenstern. As I understand it, Gusik has just said that he never saw Calfee.

MR. MORGENSTERN: He said whoever the officer was.

COL. WINDOM: Was it Calfee or not?

THE COURT: He said he was doubtful. He didn't answer positively.

MR. MORGENSTERN: He said the investigating officer, but he said he was doubtful whether it was Calfee or somebody else.

COL. WINDOM: I understood him to say it was not.

MR. MORGENSTERN: He said he was doubtful about that.

Q Now, complete the statement, the minimum sentence was freedom,

A The maximum was rope; by that, death by hanging.

Q Did you tell the investigating officer whom you desired as your defense counsel?

A Yes, I did.

Q What name did you mention?

A Lt. Ryan from the 88th Infantry Division.

Q What full name did you know him by?

A Lt. Radar Ryan.

THE COURT: Is not all this in the record?

MR. MORGENSTERN: It is, Your Honor. This is just a matter of rebuttal.

THE COURT: It isn't rebuttal if it is already in. It is repetition, is it not?

MR. MORGENSTERN: It is all in the record, Your Honor. We will withdraw the witness.

THE COURT: There is no necessity to repeat if it is already in the record, unless you gentlemen want to stay over the weekend.

Is there anything further?

MR. MORGENSTERN: Nothing further from the Petitioner.

THE COURT: How much time do you desire for argument? You won't need quite as much time now as you wanted this morning, will you?

MR. MORGENSTERN: I will put it this way, Your Honor. About an hour. I use the term "about."

THE COURT: How much time will the Government desire?

COL. WINDOM: Not over thirty minutes, Your Honor.

THE COURT: Can you agree on thirty minutes?

MR. MORGENSTERN: Yes, Your Honor, we will proceed.

THE COURT: Thirty minutes will be allocated to the Petitioner and thirty minutes will be allocated to the Respondent. You may proceed with the argument.

MR. SKLENICKA: Your Honor, this action under habeas corpus is brought under Title 28 of the Federal

Code, Section 461. Our claim is that Thomas Gusik was deprived of his constitutional rights under the Fifth Amendment of the United States Constitution, so we must look to the law on this question. The United States Supreme Court has decided that where the Constitutional rights or guarantees have been deprived to a citizen, an action is brought under a habeas corpus proceeding. The Court must look to the entire record. That is one point.

THE COURT: Just one second. Do you want these arguments taken by the reporter?

COL. VOORHIS: No, I wouldn't say it was necessary from my viewpoint, but there seems to be some dissent from the other side.

THE COURT: The Court will order the argument taken.

MR. SKLENICKA: So, the Court must look to the entire record. Secondly, the Court must admit testimony which dehors the record in order to determine whether the provisions of the Articles of War and the conduct and procedure of the trial have been applied in a fundamentally fair manner.

The question of jurisdiction has been raised in this claim. They claim that it is a collateral attack. So, we perhaps should first dispose of that question by calling the Court's attention to the fact that a citizen of the United States does not lose his citizenship or waive his Constitutional rights because of military service. The best authority on that is the United States Supreme Court's Reaves v. Ainsworth, 219 U.S. 296, and U. S. v. Hiatt. I am not going to repeat all the numerous authorities that are already in our written briefs.

THE COURT: It will not be necessary to do so. The Court will examine the briefs further.

MR. SKLENICKA: In both of these cases the Court held that the Fifth Amendment did not cease to protect one who joins the armed forces.

Now, then, an American citizen in the military service, if he is to gain the protection as guaranteed to him under

the Fifth Amendment to the Constitution, must resort under this Title 28 to habeas corpus proceedings, and the authorities for that are the famous cases of Johnson v. Zerbst, Walker v. Johnston and Waley v. Johnston.

In looking to the entire record the Court must consider: 1, whether the Court was properly convened; 2, whether the testimony and the transcript is true; 3, were the Articles of War complied with and was there an investigation which was thorough and impartial; 4, whether the defendant had competent defense counsel and a fair trial; 5, whether the verdict is proper and beyond attack.

Now, let us take them in that same order. Until the hearing in this Court here in Columbus, there was nothing in the record to indicate that the Court at Leghorn was properly convened. It was for the first time supplied at this hearing.

No. 2. Is the testimony in transcript true? The direct and indirect statements are in such sharp conflict and so contradictory that no one can honestly believe them to be true, and that is again borne out by the testimony that has been produced here in open Court by the witnesses of the Government. This is not upon a theory of the weight of the evidence. The testimony of Sergeant Urdinarrain, for instance, who was here in Court, must have proven to anyone who heard it that the testimony of the transcript is not true, because he contradicted the record testimony right here in this court room. Sergeant Urdinarrain's testimony clearly and definitely must have proven to the Court that the Articles of War had not been observed, that the investigation was not thorough and it was not impartial.

Now, if the investigation was thorough and impartial, why didn't the JAG have the fragments of the pellets tested when they were available and were offered by the doctor who made the post mortem? Why wasn't it developed that four or five other guns were firing and of different caliber? That was the duty of Lt. Calfee but

it was not performed. Why didn't this supposed thorough and impartial investigation develop all of the facts in this case, or were they just afraid of the truth?

Did he have competent defense counsel and a fair trial? Maybe his counsel was considered competent in the eyes of the office of JAG where he was employed, and perhaps protecting his job and had a lot of convictions that were favorable to this office, but certainly he was not competent to defend this accused who was a young man only seventeen years, or seventeen and a half years of age. He had never been in a court room, never in a court martial, knew nothing about his Constitutional rights or the procedure. The transcript does not show it, but among miscellaneous documents in the file, there is a record which shows that this Lt. Burks was a graduate of two universities, having two degrees in law, LLB and a Master of Law. The type of defense that he rendered to this defendant, his failure of investigation and his total failures in this trial, which I believe is one of the most important and significant things in the progress of that trial, his failure to challenge the so-called confession that was introduced in this case, never inquiring whether it was made by Gusik or under what circumstances it was offered, is important and significant. The Court has no doubt heard many cases and read many cases, and counsel has as well, and I know of no case in criminal procedure where in a first degree murder case the confession was not challenged. Furthermore, this defendant had already been discharged by his commanding officer on the ground that it was justifiable homicide. He made no effort whatsoever to challenge that statement or to make any investigation of it. He made no investigation of these various witnesses, which are found among the miscellaneous papers that were not in the transcript, and we were barred from arguing it in Washington D. C., which indicated that there were four or five guns being fired at the same time, that one was being fired from without the compound and four from within in the direction towards the woods, and that was

in the dark. It is hardly humanly possible, I say it is absolutely impossible for anyone to say what gun and what bullet killed these two men who were found on the outside of the compound and shot in the evening that Gusik was on guard duty.

Now, if that is a sample of competent defense then certainly we as lawyers ought to hang our heads in shame for the legal profession, for the type of defense that was rendered in behalf of Thomas Gusik in this particular case. He was entitled to better protection than that. He asked for Lt. Radar Ryan. There was no explanation, no effort to find Lt. Radar Ryan, but he was given Lt. Burks. Burks was appointed only forty-eight hours before the day of the trial, and the uncontradicted testimony in the record is that he spent only ten minutes time in preparation of a first degree murder case. I think if that is a sample of the type of defense he had, that in itself should definitely prove to this Court that he did not have a fair and impartial trial.

There were other matters that were involved here. There was for a long time prior to this investigation of Gusik, an investigation going on about a theft in the compound, a million dollar theft. Sergeant Urdinarrain testified to that. But, after Gusik had once been discharged of this alleged murder, claiming that it was justifiable homicide, he was re-arrested and then by this haphazard method of investigation conducted by Lt. Calfee, was charged with murder and tried under that, and then after this trial the investigation of the million dollar theft was conveniently hushed. Can anyone call such procedure fair? Can they call such a trial fair? Is that a guarantee of the Fifth Amendment to the Constitution? Can anyone honestly say that justice was served or that the verdict is proper and is beyond attack? We all understand that discipline is necessary, but there is no rule that makes a mockery of the laws and justice.

I would like to make an analogy. An umpire in a baseball game has the final voice, and in each game whether right or wrong he makes his decision. It is also part of

a system and makes for discipline. To maintain discipline, however, they rarely change their decisions, but it can be done. However, it takes courage and the game must go on and the system protected. A mistake in baseball may bruise some feelings and it may cost some money, but a mistake in dealing with the human rights and liberty and the citizenship of a mere youth in an army uniform performing his duty when the shooting war ended to justify a system of trial never too popular, and in this case practically ex parte proceedings, is paying a high price or price never contemplated under our Constitution.

It may be difficult for the army to retract their decision, and they have certainly stood their ground in this case as evidenced by the testimony of the witnesses they produced and their effort in trying to justify their claim, but recently a very high ranking officer in the United States Army saw fit to reduce the sentence of a most notorious woman in Germany, Madam Ilsa Koch, who was convicted of making lamp shades of human skins from countless innocent victims whom she tortured and destroyed. By comparison with our case which involves a youthful soldier of the United States Army, and in view of the evidence and the general conduct of the trial, the Army certainly should not feel squeamish in any reversal of their judgment, and if they had the proper courage the boy never should have been convicted in the very beginning. This is perhaps best stated by the United States Supreme Court in the case of Haley v. State in 1948 January, wherein the Court stated —

> "Recitals which merely formalize constitutional requirements cannot prevail over the facts of life which contradict them. They may not become an empty cloak * * * and make an empty form of the due process of law which free men fought and died to obtain."

Thus far we have taken the one question about looking to the record. Now, we go into the second phase in which the Court must admit testimony which dehors the record. The Court with some reservation permitted testimony. The testimony submitted, without repeating the previous remarks, very definitely proves that the Articles of War were not observed and that the conduct and procedure of the trial was not fair and impartial, and that the laws and rules were not applied in a fundamentally fair manner. Under the regulations and practice, it was Lt. Calfee's duty within forty-eight hours to make an investigation and call a meeting at a place which was convenient for the defendant and the witnesses to appear. But what did he do? Immediately after his appointment he proceeded to Pisa, Italy, to the place of confinement. He made no plans or preparations for any witnesses to appear, and if the Court will examine the record, the pre-trial report that was made by him is a printed form in which he supplies various other things in between the paragraphs that are printed, and so he supplied the information for the greater part. I think the Court will recall very distinctly the conflicting and contradictory testimony of Urdinarrain in this case before this Court.

We are not asking the Court to weigh the evidence, but in order to determine whether the Petitioner's rights under the Fifth Amendment have been violated the Court must in examining the record look into the entire record from the beginning to the end; must examine carefully the conduct of the investigation and the prosecution; the conduct of the Court and the counsel for both sides; consider the testimony which determines the question.

If we were to inject our own personalities in this case we might best answer the question by searching our own conscience and apply the facts as we hear them and read them in this case, and then apply the law and ask ourselves, would I convict my own son, a friend or a stranger under the same circumstances? Am I satisfied with

the trial and everything connected with it and the result as it now stands, that it is justified and proper? We of counsel who have spent countless hours of hard work in preparation, hearings, trial and voluminous briefs, have interested ourselves from the beginning because of our firm belief that an injustice was performed. We have labored gratuitously and spent our own time and money for expenses, all because we believe a great principle is involved, the guarantees of a constitutional right under the Fifth Amendment of the Constitution known as the due process law; and also because it involves an American youth who was only seventeen and a half years of age in a strange and foreign country performing a sworn duty, protecting Government property while a soldier in the United States Army; and finally, that a soldier's citizenship and constitutional guarantees shall not be denied because of military service.

Let me in conclusion just read a paragraph which appears in the Plain Dealer this morning under the column of William McDermitt, in which he today deals with the question of court martial trials, particularly in Tokyo. However, he makes this observation, and with this I close because I believe it is an excellent observation—

> "There is a grave dereliction of duty somewhere along the line (referring to court martials and trials) and I suspect it is rooted fundamentally in the unconcern of military jurisprudence for their rights and deficiencies which are granted to individuals under civil law in a democratic society."

We say, Your Honor, that we have proven beyond all shadow of doubt in this case that Thomas Gusik, within the meaning of the Fifth Amendment, did not have a fair and impartial trial, nor was the law fundamentally and fairly applied, and the writ should be granted.

MR. PRICE: When we started into this case, before

we went very far, I took the matter up with Dean Fletcher Andrews of the Western Reserve University of Law. I did that because Dean Andrews had been Chairman of one of the boards in the Judge Advocate's Department at Washington all during the war. He was very familiar with the practices of that Department, and I submitted this entire record to Mr. Andrews and asked him to give me an impartial opinion before we, as veteran organizations, took the matter up.

He made a very exhaustive investigation of the record and all the facts, and I want to read you his conclusion, Your Honor, because I think he speaks with a great deal of authority. He is a man who is highly respected by all of us, especially in Cleveland where we know him well. He says this—

> "of course, it is recognized that intent to kill is not an essential element of malice aforethought, but the circumstances of the present case would permit a finding of intent to kill. It therefore becomes necessary to consider whether an intentional killing under the attendant circumstances may properly have been found to be with malice aforethought.
>
> Conceding that the court had a right to disbelieve Gusik's statement that he cried "Halt," especially in view of the testimony to the contrary, the evidence gives rise to no other inference than that Gusik shot in order to prevent unlawful entrance of the Italians into the depot. Since he failed to comply with the Post Special Orders requiring him to "challenge" before firing, he is deprived of whatever protection those orders would have afforded him. He stands, then, in the position of one who shoots in order to prevent the commission of a felony attempted by force or surprise. Such a killing is justifiable and does not constitute a crime."

I will file this brief with the Court. He refers to the Manual for Courts Martial and several authorities.

"Certainly the attempted breaking into the depot by several Italians during the night, with the probable intention of taking Government property, was sufficient to bring the accused within the rule referred to. Although the Post Special Orders required him to challenge intruders, his mere failure to follow those orders does not affect him insofar as criminal liability is concerned. Post orders cannot create murder where no murder is present.

"While it is true that a homicide is not justifiable even under the designated exception if more force is used than was reasonably necessary to prevent the apparent felony, it is submitted that under the circumstances the accused acted reasonably. It would be dangerous to encourage courts to convict men on guard duty of homicide under such circumstances.

"Even if an accused uses unreasonable force to prevent the commission of a felony, his killing lacks that abandoned and malignant quality essential for murder.

"In summary, it has been shown that the record of trial is replete with errors, which, we submit, are so substantial in quantity and quality as to bring the case within the rule that conviction is improper unless the competent evidence practically compels a conculsion of guilt. It is submitted that the competent evidence does not compel such a conclusion and that under the prescribed standard, the record fails to show that the accused killed the two deceased, or either of them, and shows that the killing, even if done by the deceased, was justifiable.

"For the reasons presented, it is urged that the Board of Review and The Judge Advocate General hold the record of trial legally insufficient to support the findings and sentence, and that the findings and sentence be vacated, as provided in Article of War 50 1/2."

Now, I asked Mr. Andrews to suppose that this young man had not called "Halt" as he claims, and under those circumstances what he would think of the case. There was a conflict of testimony and that was his opinion. Now, the evidence is positively to the contrary that this young man did call "Halt." There is a totality of errors in this case; there are so many things that when you add them altogether you just simply are forced to the conclusion that there is nothing here to support a verdict of guilty of murder in the first degree.

Here is a boy who had always a fine record at home in Cleveland, a good church member, a fine boy in high school. He has a fine father and mother. He had everything that goes with a good home and a good record at home. Now he gets into the army and goes over to Italy. There was a lot of this black marketing going on. The very men on whose evidence this boy was convicted were admitted racketeers. They ganged up on this boy. I can see how the Commanding Officer was so enraged at this black marketing that was going on that he wanted to make an example of somebody. It is just almost judicial notice to the Court that under such an exasperating situation somebody had to be made to suffer, and this was the result. There were officers, there were men there who were guilty of black marketing, and it is my humble belief that they foisted this crime on this innocent boy because they thought he was of foreign birth, that he had no friends and all of that sort of thing. They picked him out. I think this boy was deliberately framed by a lot of men who were really guilty of the offenses.

Now, what did they do? They charged this boy—in order to make a case they said "this boy invited these men to this place." The evidence shows and Parker says himself that he invited them. Gusik never invited them. He never had any interest in this thing. He happened to be a mess mate or a tent mate of one of these men who were suspected of it, but they were never tried for it. And, the man upon whose testimony he was convicted went AWOL and had to be brought back by the police immediately after he testified. What happened to him? He got six months. For what? This boy wasn't charged with larceny.

THE COURT: Counsel has three minutes left.

MR PRICE: He wasn't charged with black marketing. He was charged with murder and convicted on the charge of murder. Now, under these circumstances, Your Honor, we feel very strongly that this boy has not had a fair trial. You know, sometimes we have to step into a situation and do what is right. For instance, a lot of these people who have murdered Americans abroad, like Japanese and Germans, are now being released from jail under general amnesty orders of General McArthur. Yet this American boy isn't even given the benefit of any doubt. Is that the way we treat our own American citizens? Does the Constitution follow these boys when they go into the army? Is that protection to be taken from them because they enlisted in the army, because they go out to fight for the things that we all stand for, and for our protection at home?

This boy, Tom Gusik, was performing his duty. He shot to protect Government property after they cut the fence and were coming through. Under those conditions we say to the Court that this is a proper case of habeas corpus. A wrong has been done and it should be righted. I believe that every right minded American will stand by this Court in this interpretation of a most exasperating case.

You know, I sometimes think of that old poem of Louis Stevenson when he said—

"Only the Master shall praise us,
Only the Master shall blame,
And no one shall work for money
And no one shall work for fame,
But each for the joy of working
Each on his separate star
Shall do the thing and draw the thing
As he sees it for the good of things as they are."

MR. MORGENSTERN: Your Honor, we have exhausted our time, but we should like a few minutes for rebuttal. We are through with our main argument.

THE COURT: Yes. The Court will hear counsel for the Respondent.

COL. VOORHIS: If Your Honor please, Petitioner through his counsel adopts as a premise to his approach to you the statement which they repeat as a fact over and over again, and that is that during the incident in question Gusik was performing his duty as a soldier, was protecting American property. From there they go off into the merits of the case. They don't want you to review the evidence, but they want you to conclude that a mistake was made in the case and the findings. Well, I don't know what else a review is than that.

The first thing that happened at the court martial trial of Gusik are the two stipulations that appear early in the transcript of the record. It was stipulated right at the outset that Gusik was on guard, and by stipulation the special orders pertaining to his duties as a guard were introduced in evidence. That is the first thing that hit the Court. They knew that he was out there on duty and had he performed his duty the findings might not have been as they were. However, the Court resolved that question of fact and found him guilty.

Thereafter the Staff Judge Advocate of the Port of Leghorn, as required by statute, reviewed the record of trial and advised the reviewing authority, the Commanding Officer of the Port of Leghorn. The Commanding

General of the Port of Leghorn approved the sentence and forwarded it for further appeal at review. A Board of Review in the office of the Judge Advocate General, after having the benefit of eminent counsel which are now before you, extensive briefs, one of which was introduced in evidence, another of which was read during the argument in part to you this afternoon, sustained the action of the court martial in an opinion which runs twenty pages. I commend the opinion to your attention to see with what care and precision and detail the arguments that have been made to you in this case were properly made through the Board of Review on a direct appeal. Now you are asked to consider the same things that the Board of Review, the office of the Judge Advocate General considered on a direct appeal, a direct review. After the Board of Review acted, the Judge Advocate General concurred in their opinion and findings and brought the matter to the attention of the Secretary of the Army with the recommendation that the sentence be reduced from life to sixteen years, and that was done.

I can't believe, Your Honor, that it is the function of this Court sitting in habeas corpus to go into the detail of that trial which has been through, as I have just related, four or five stages of direct appeal and review.

Some small moment has been made during today that the charges were not investigated within forty-eight hours, that Gusik was held in confinement more than eight days without being brought to trial, without charges being preferred, and so forth. I refer to a case that you may have heard about. It is the case of Jack W. Durant v. William H. Hiatt, a Warden of the United States Penitentiary at Atlanta, which was decided on a petition for habeas corpus by U. S. District Judge Robert L. Russell in the Northern District of Georgia on the 10th of December 1948. In part he says—

> "The failure of military authorities to direct an investigation of the charges against Petitioner dated June 8, 1946 and his continuous con-

> finement without such investigation and trial until November 1946, when the charges upon which the Petitioner was tried and convicted were filed and investigated, presents no ground for a voidance of the legal effect of the trial and conviction upon the charges later filed in proceeding. . . .

The analogy is that a delay in a trial before a civilian court, your own court, Your Honor, does not oust your court of jurisdiction because there has been a delay, and it would be a strange anomaly if it did.

Now, we are asked today to accept verbatim and explicitly every last word that Gusik has testified during this case, and any time there is any contradiction believe Gusik and disbelieve the contradiction.

Petitioner avoids mention of the rule of long standing that in a collateral proceeding such as this the burden is always on the Petitioner to prove the allegations of his petition, to prove those facts by the preponderance of the evidence which might result in a finding that he is being illegally detained. In a recent case decided by Judge Underwood of the Northern District of Georgia, Jackson v. Sanford, reported in Federal Supplement 79, page 74, a somewhat similar situation arose. This was a petition brought by an ex soldier who was held in Atlanta following trial by court martial. Judge Underwood said in part—

> "In determining where the preponderance of the evidence lies, the usual rules of evidence apply and testimony of Petitioner may be disbelieved even when not rebutted by the evidence."

It gives several citations.

In the present case Petitioner's testimony supports the allegations of his petition, but all the other evidence, including the certified record, is to the contrary. The

mere assertions of Petitioner are not sufficient to establish a preponderance of the evidence when contradicted by all the other facts and circumstances, and he cites about seven or eight cases. We have a conflict between the Petitioner and Urdinarrain; we have a conflict between the Petitioner and the record and the Investigating Officer. Our position from the outset has been that this record may not be impeached either by the Petitioner or by the Investigating Officer. He is bound by it and the Respondent is bound by it.

For the purpose of argument I will consider the investigation. It is based on or provided for in Article of War 70. The second paragraph of Article of War 70 has these two sentences in the middle of the paragraph—

> "At such investigation full opportunity shall be given to the accused to cross examine witnesses against him if they are available, and to present anything he may desire in his own behalf, either in defense or mitigation, and the Investigating Officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides."

From there we go to the Presidential Executive Order, the Manual for Courts Martial which, when not consistent with statute, has the force of law within the military services. We find in paragraph 35 on page 25 of the Manual these instructions on how to make an investigation. They are not all the instructions in this paragraph, but they apply particularly to the facts in this case.

> "Where the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained by written statement of the witness, interview with the witness,

or other similar means, and the accused states that he does not desire to cross examine such witness, the witness need not be called even if available."

Now, that is the procedure that is prescribed in the Manual that was followed by the investigating officer in this case. According to his testimony before us, and according to his written report wherein he states "the accused did not desire to exercise his right to cross examine any of the witnesses, the witnesses were not called and the substance of their testimony was made known to the accused.

Basically, regardless of phraseology, how it is reached, in a proceeding such as this the jurisdiction of the trial tribunal must be affected before the current confinement can be held illegal. That comes right down through all the court decisions, including the Supreme Court decisions, down to date. There are three recent Court of Appeals opinions. I think I have referred to them by name in my last brief. I may not have. There is Smith v. Hiatt in the Third Circuit. It was decided, I believe, in November. That is currently before the Supreme Court. There is Henry v. Hodges decided about December 5, which is in flat contradiction with the majority opinion in Smith v. Hiatt in the Third Circuit. There is Benjamin v. Hunter in the Tenth Circuit which appears about 168 Federal Second, and the succeeding case of Dwor v. Hunter which will probably be in 170. I would urge Your Honor, if he wishes any further expression of the law, to read those three or four Court of Appeals cases. I regret that none of them are in this Circuit, but you may find guidance from the majority and minority opinions in those cases.

THE COURT: Are all the cases reported, Colonel?

COL. VOORHIS: I don't believe they are, sir. Benjamin is now reported about 168. Dwor should be in this current 170 that is coming out; that is, Dwor v. Hunter. Smith v. Hiatt should be published any minute

now, and Henry v. Hodges should be. They are all available in the weekly service that you have. It is believed that upon a consideration of these proceedings as a whole that the jurisdiction of this court martial cannot be successfully attacked. The procedures, the Articles of War were exercised in a fundamentally fair manner.

THE COURT: Is not that the ultimate question to determine, Colonel?

COL. VOORHIS: It is, if Your Honor please, but we cannot run smack up—

THE COURT: Is not that the sole question to determine in this case?

COL. VOORHIS: The Petitioner argues this way, that if after reading all the evidence in the trial you would not have found as the court martial did, that therefore it is unfair.

MR. DIRENFELD: Object, Your Honor.

COL. VOORHIS: However, where a court makes a decision on disputed facts, the correctness or error doesn't enter in. Sunal v. Large in 333 U. S. Reports was a case where the trial tribunal denied the Petitioner the right to make a defense. The matter of law ruled the law, whereupon he was subsequently convicted. Its appeal period passed. Another person who was tried about the same time was also denied the right to make that defense. He took his case up and the Supreme Court held that as a matter of law he had a right to make that particular defense and sent the case back and he made the defense and was acquitted; whereupon Sunal brings this petition for habeas corpus attacking his trial because it was so grossly unfair, because the trial judge as a matter of law wouldn't make him make the only available defense he had. The Supreme Court said "that's too bad, it is a wrong decision but it does not affect the fairness of the trial."

THE COURT: Did the Court understand you to say that the entire case would turn upon the question of jurisdiction of the court martial tribunal?

COL. VOORHIS: Yes, my position on that is—

THE COURT: In other words, no matter how unfair basically the proceedings were, no matter whether this Court was of the opinion that the constitutional rights of the Petitioner had been violated, this Court would have no right to review the proceedings to determine whether or not the Petitioner had a fundamentally fair trial in accordance—

COL. VOORHIS: No, sir, that is not our standard of law in this country. It is jurisdictional either that the court martial never acquired jurisdiction—

THE COURT: Might they not lose jurisdiction by the nature of the proceedings?

COL. VOORHIS: —Or, No. 2, that something happened in the course of the trial which rendered it so grossly unfair and unjust that it lost the jurisdiction which it had at the outset.

THE COURT: Is not that the fundamental question for this Court to decide, whether or not the Petitioner was deprived of his constitutional rights?

COL. VOORHIS: That is the ultimate question, because I do not think in this case that even the Petitioner claims the court martial did not acquire jurisdiction.

THE COURT: Your contention is that the court martial tribunal lost jurisdiction by reason of its denial of the constitutional rights which the defendant should have had and enjoyed at the trial?

MR. DIRENFELD: Correct. At the trial and pre-trial.

THE COURT: There is no necessity of you gentlemen reiterating what you have in your briefs. The Court has examined these briefs and will examine them further.

MR. MORGENSTERN: We have nothing further with the last statement of the Court.

THE COURT: The Court desires to express its appreciation to counsel for the Petitioner and counsel for the Respondent for the help and cooperation given

to the Court, although you have not completely settled the ultimate question to be determined by the Court. However, I must say that you have been most cooperative in advocating what you believe the law to be, and for that the Court is grateful to all of you. I know that you have not always agreed with opposing counsel as to what the courts have decided. Sometimes I am little doubtful myself as to what the law actually is, although the Court will attempt to apply the law as it sees it in this case.

The Court believes it would be advisable that you make findings of fact and conclusions of law. The Court will direct the Petitioner to make tentative findings of fact and conclusions of law and submit them to the Court, citing the page or pages of the record upon which you base your findings of fact, and the authority or authorities upon which you base your conclusions of law. The Court will direct the Respondent to do likewise. You will submit your tentative findings of fact and conclusions of law, citing the page or pages of the record upon which you rely for your findings of fact and the authority or authorities upon which you rely for your conclusions of law.

Now, how long will you gentlemen desire?

MR. DIRENFELD: Your Honor, once again we are faced with this proposition. We will have to get today's testimony.

THE COURT: Is it not necessary in accordance with the rules, before the Court can ultimately determine and dispose of this action—and the Court is referring to Rule 52—that findings of fact and conclusions of law be made?

MR. DIRENFELD: Yes.

THE COURT: Rule 52 provides in effect—"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

The Court is merely asking you to give the Court your version; in other words, your tentative findings of fact and conclusions of law.

MR. DIRENFELD: We weren't objecting, Your Honor. All we were inquiring about is whether we should proceed without the record of today's testimony?

THE COURT: That is entirely up to you. Can you agree upon the time? There will be no exchanging of findings of fact and conclusions of law. You will submit your tentative findings to the Court at the earliest possible date. Now, how much time will you desire?

MR. DIRENFELD: Approximately ten days after receipt of the transcript.

THE COURT: How much time do you desire?

COL. VOORHIS: That would be agreeable to me, Your Honor, if I am where the transcript arrives. If I do happen to be out, I would like the privilege of applying to you for an extension.

THE COURT: The Court will direct the Petitioner to submit his tentative findings of fact and conclusions of law in accordance with the instructions of the Court, within ten days after receipt of the record; the Respondent to submit its findings of fact and conclusions of law in accordance with the instructions of the Court, within ten days after the receipt of the record.

Is there anything further in connection with this case?

MR. MORGENSTERN: Nothing further, Your Honor.

THE COURT: Once again the Court desires to thank all of counsel for your helpful assistance, and I hope that you will be able to reach the proper findings and conclusions which will be of benefit and assistance to the Court in determining this most important question.

I hereby certify that the foregoing is a true, complete and correct transcript of my notes taken on the date indicated.

Irmgard E. Modlich
U. S. District Court
Reporter for the Southern
District of Ohio.

RESPONDENT'S EXHIBIT "A"

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

Washington, 12 May, 1948

I hereby certify that the attached is a photostatic copy of the record of trial of Private Thomas A. Gusik, RA 15220411, by a general court-martial which convened at Leghorn, Italy, 9 October 1947, together with accompanying papers, official copy of Department of the Army General Court-Martial Orders No. 32, dated 26 January 1948, review by the Board of Review dated 16 January 1948 and first indorsement of the Judge Advocate General dated 26 January 1948, on file in the office of The Judge Advocate General.

THOMAS H. GREEN
Major General
The Judge Advocate General

I hereby certify that Major Thomas H. Green, who signed the foregoing certificate, is the Judge Advocate General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Kenneth C. Royall, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be

subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this twelfth day of May, 1948.

Kenneth C. Royall
Secretary of the Army.
By James C. Cook
Deputy Administrative Assistant

DEPARTMENT OF THE ARMY
In The Office of The Judge Advocate General
Washington, D.C.

W.D., J. A. G. O. Form No. 34
(Revised July 1, 1940)

Board of Review
CM 326604

16 Jan. 1948
United States
v.
Private Thomas A. Gusik
(RA 15220411), 7156th Engineer Guard Company
(Overhead).

Port of Leghorn
Trial by G. C. M., convened at Leghorn, Italy, 9 October 1947. Dishonorable discharge and confinement for life. Federal Reformatory.

Respondent's Exhibit "A".

HOLDING BY THE BOARD OF REVIEW

Silvers, McAfee and Ackroyd, Judge Advocates

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the sentence.

Chester D. Silvers, Judge Advocate.
Carlos E. McAfee, Judge Advocate.
Gilbert G. Ackroyd, Judge Advocate.

1st Indorsement Jan. 26, 1948.

J.A.G.O., Dept. of the Army To the Adjutant General.

1. In the case of Private Thomas A. Gusik (RA 15220411), 7156th Engineer Guard Company (Overhead), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. This office has been advised that the necessary records ordinarily retained in the field for preparation of General Court-Martial Orders have been lost in transportation by aircraft and it is therefore recommended that the required General Court-Martial Orders in this case be published by the Department of the Army.

3. In view of all the circumstances of the case, including the youth of the accused, and the fact that all of the members of the court-martial recommended clemency in a letter to the Reviewing Authority, I have recommended to the Secretary of the Army that the period of confinement be reduced to sixteen years. The Secretary of the Army has concurred in this recommendation. A draft of General Court-Martial orders in conformity with the foregoing action is inclosed.

Respondent's Exhibit "A".

4. The return to this office of the holding together with five copies of the published Department of the Army General Court-Martial Orders is requested.

(CM 326604).

Thomas H. Green
Major General
The Judge Advocate General

1 Incl
Draft of GCMO

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.
JACK — CM 326604

United States
v.
Private Thomas A. Gusik
(RA 15220411), 7156th Engineer Guard Company
(Overhead).

16 Jan. 1948
Port of Leghorn
Trial by G. C. M., convened at Leghorn, Italy, 9 October 1947. Dishonorable discharge and confinement for life. Federal Reformatory.

REVIEW BY THE BOARD OF REVIEW

Silvers, McAfee and Ackroyd, Judge Advocates.

1. The Board of Reivew has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead),

did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

Specification 2: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

He pleaded not guilty to and was found guilty of the charge and both specifications thereto. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of the Army might direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. **Evidence**

During the times hereinafter mentioned, the accused's unit was employed in the capacity of guarding Engineer Depot E2L 76 at Tirrenia, Italy. On 11 August 1947 the accused was regularly assigned as a member of the second relief on the guard roster for 12 August 1947. It was stipulated that Prosecution Exhibit 1 was a true copy of the special orders for the guards on 12 August 1947. Pertinent provisions of these special orders were as follows:

Respondent's Exhibit "A".

"SECTION III – SPECIAL ORDERS FOR POSTS

1. Post No. 1, 2, 3, 4, 5, 6, 7, 8, 9,

(a) My post is a 24 hour fence post. In case the lighting system becomes out of order, I will immediately report this incident to the Sergeant of the Guard.

(b) The tower being in the center of my post, I will walk halfway between the tower on my right and left.

(c) I will check the fence line for holes and will notify the Sergeant of the Guard if any are found.

(d) Any person loitering near the fence after the hours of darkness will be fired upon after challenging.

(e) Between 1700 hours and 0800 hours no unauthorized persons or vehicles will be in my area.

(f) I will check with the Sergeant of the Guard, by telephone, every hour on the hour.

(g) In case any person is in my area I will call "halt". If the person fails to halt I will fire a warning shot in the air. If the person still fails to halt I will shoot to kill.

(h) In case of fire I will immediately notify the Sergeant of the Guard."

First Lieutenant Walter P. Birmingham was detailed as the Officer of the Day. The accused was assigned Post No. 4. Private First Class Frank Zahurones was also on the second relief and was assigned Post No. 5 (R 6, Pros Ex 2).

At about 1900 hours on the evening of 11 August 1947, the accused and Private William E. Hoagland, who was on the third relief of the guard roster heretofore mentioned, secured passes and went to the hotel at Tirrenia. Near the hotel they met two Italians and the accused asked them if they knew "Franco." They replied in the affirmative. The accused told them to tell Franco that he would be on guard at Post 4 the following night on

the second relief and that if Franco came to the post and whistled "Angelina" he (accused) would in turn whistle another verse of "Angelina" "for them to come in." Private First Class Hoagland testified that he was present and heard the conversation aforementioned, that they were at the time standing about 300 yards from the hotel and that the purpose of the proposed transaction was "To get tires, I guess." The accused and Hoagland returned to camp at about 2100 hours and Hoagland testified that as they traveled back the accused "told me he was going to get Franco because Franco had screwed him out of a wrist watch". Accused had not told the witness "how" he was going to "get" Franco (R 7-8). On cross-examination the witness Hoagland stated that he did not know why these men (Italians) were going to the depot (R 9).

Di Pinto Luigi, an Italian whose home was near Naples, testified that at about 0300 hours on 13 August 1947 he and his brother Franco, Alvaro, Marcello, Salvatore Montalbano ("Siciliano") and Teodoro Moro went to Post 4 at the Engineer Depot in Tirrenia, Italy, to get six tires "as was arranged * * * with the sentinel on Post 4, who made the arrangements with my brother." The witness stated that his brother Franco had previously gone to the depot for the purpose of getting tires or other property. There was a wooded area near Post No. 4 and the witness asserted that as they approached this Post "Franco" went forward to talk with the sentinel while he and the other Italians remained in the woods to the rear. Luigi identified the accused in court as having been the sentinel whom he saw conversing with Franco. The sentinel then walked toward Post No. 5 "because he thought there was an inspection." Marcello entered an opening that had been cut in the fence and "three or four seconds" later shots were fired from the direction of Post No. 5 and "they were standing beside me — there were two dead people." Luigi identified Prosecution Exhibit 3 as a photograph of "Siciliano" and

Prosecution Exhibit 4 as a photograph of Moro, and stated that these were the persons who had been killed by the shots coming from the direction of Post No. 5. In response to a question as to whether the sentinel gave any command such as "halt" before the shooting the witness replied, "nothing" (R 7-12, 17).

On cross-examination Luigi stated that at the time of the conversation between his brother Franco and the accused, "the five of us were about 200 meters of distance." Thereafter, Franco called them to the fence while the sentinel was present and "He told us to cut a hole in the fence and then walked away toward Post 5." Upon examination by the court the witness asserted that he had seen the accused two or three times prior to the night of 13 August 1947, having been introduced to him by his brother Franco. The witness was asked, "Was there any signal given before your brother went over to the fence on the night of 13 August 1947?" Luigi replied, "Yes, he was whistling Angelina. * * * my brother answered and then he went over to him" (R 14).

Alessandri Alvaro of Marina di Pisa identified two photographs marked Prosecution Exhibits 3 and 4 and stated that the bodies shown thereon were those of Salvatore Montalbano and Teodoro Moro, respectively. He knew an Italian named Franco who "is gone." The witness stated that he was present when Moro and Montalbano "got shot." Franco, Luigi, Marcello and a "certain Ciro" were also present. The following questions propounded to the witness and his answers thereto are quoted from the record:

"Q. For what purpose did you go to the Engineer Depot on that morning?

"A. The previous day I had given 80,000 lira to an American.

"Q. What American?

"A. I don't know him. I have already told that to the commanding officer.

"Q. For what purpose did you go to the Engineer Depot with these other Italians on that morning?

"A. For what reason?

"Q. Yes.

"A. They asked me to come along with them. They said, 'There is an American who is going to give us some tires'.

"Q. Do you know where Post No. 4 is at the Engineer Depot?

"A. Yes.

"Q. Was that where the shooting took place?

"A. Yes, the shooting happened between Post No. 4 and Post No. 5.

"Q. As you approached Post No. 4 that morning, was any signal given by anyone of your group?

"A. Yes.

"Q. What signal?

"A. Franco was whistling 'Angelina.'

"Q. Was there a sentry on Post No. 4 at that time?

"A. Yes.

"Q. Could you recognize that man if you were to see him again?

"A. I couldn't recognize him. The lieutenant has already shown me him but I wasn't able to.

"Q. Did the sentry on Post No. 4 return any signal to Franco?

"A. Yes.

"Q. What signal?

"A. 'Angelina' — he was whistling that also." (R 18).

The witness stated that after the whistling of "Angelina" Franco and Moro went to the fence and talked with the sentinel of Post No. 4 for two or three minutes. Subsequently, Franco returned to where the other parties were waiting and they also went to the fence. The sentry then walked toward Post No. 5. Alvaro asserted that one of the parties went through the fence and "At the same time I was crossing through the fence he began firing." The hole had been cut by Marcello with pliers. "While the hole was being cut the sentry was right there

nearby." "The sentry told us to enter and I entered and the shooting began." The sentry walked toward Post No. 5 and the shooting came from the direction of Post No. 5. No command to halt was ever heard by the witness who stated that Moro and Montalbano were "hit by the firing" and that another was wounded (R 20). On cross-examination Alvaro stated that they had an appointment from 11 o'clock to 1 o'clock on the same evening with an American called "Bobby," that Franco and Moro had gone inside the camp and "then an inspection came and made them get out." After the two men were shot the witness heard an American say, "From today onwards nobody is going to enter the depot again" (R 21-22).

First Lieutenant Walter P. Birmingham, 1170th Engineer General Service Regiment, the Officer of the Day at the Depot on 13 August 1947, testified that he had inspected the guard at "around two o'clock" and that about one-half or three quarters of an hour later he was awakened by shooting near Posts No. 4 and 5. He dressed and accompanied by the sergeant of the guard went to the scene of the shooting, which was near the accused's post, No. 4. He heard moaning around the fence and "instructed the sergeant of the guard and Gusik to go outside the depot and see what it was." They brought back one dead Italian and one who appeared to be dying. Lieutenant Birmingham identified and there was received into evidence without objection as Prosecution Exhibit 3 a photograph of the dead Italian. He identified Prosecution Exhibit 4 as a photograph of the wounded Italian. Lieutenant Birmingham did not examine in detail the bodies brought to him nor did he investigate the shooting. He asserted, "The man admitted it." The President of the court directed the following question to the witness: "When you say he admitted firing the shots, do you mean the accused?" To which the witness replied, "Yes, sir." The officer immediately ordered an ambulance and had the bodies

taken to the Italian civilian hospital in Pisa (R 22-26).

Dr. Ideale del Carpio of Pisa, Italy, testified that he was a "teacher of legal medicine at the University." On 13 August 1947 he had performed an autopsy on the body shown by Prosecution Exhibit 3. Death was caused by gunshot wound in the lungs producing interior hemorrhage. He also performed an autopsy on the body shown by Prosecution Exhibit 4. Death of this person was caused by interior hemorrhage brought about by gunshot wound in the lungs and heart. Prosecution Exhibit 4 was received in evidence without objection (R 26-27).

On cross-examination, Dr. Carpio was asked if he could render an opinion as to the caliber of the bullets which penetrated the bodies of the deceased persons. He responded by stating that "as regards Montalbano, it was a trespassing wound." The diameter of the entrance wound appeared to be between seven and eight millimeters. "As regards Moro, we had two entrance holes," one in the anterior of the thorax which "was large and did not correspond to what should have been the caliber of the bullet. The outside of the slug was rather fringed and we could not identify the weapon according to the lines." From an examination of the bullets he determined that the weapon "was a long one of medium caliber." The witness stated that the "pieces" were in the institute at Pisa subject to the disposal of the authorities. The projectiles were not produced or further identified. (R 27).

Private Ursl B. Parker was a member of the same company as the accused and was his tentmate. Parker testified that sometime in the afternoon of 12 August 1947 he told the accused that some Italians were to come to his post, No. 2, that night and that if the accused desired he would send them over to his post. The accused replied, "OK." Parker was on the third relief, "eleven until one o'clock." The accused was to be on Post No. 4. Parker was not sure if they discussed the object to be obtained by the appearance of the Italians. He stated,

"I am not exactly sure, sir, but I know when anyone goes to that post, it is for tires." Parker knew Franco and asserted that he told the accused that they would be whistling "Angelina" as the signal. Franco came to Parker's post at "11:15" and had some other Italians with him. He told Franco that if he "couldn't do anything" on his post "he could go over to Tom's post and work there." By "Tom" he referred to "Gusik." When the "OD" came Franco left and Parker did not see him anymore (R 28-30).

Private First Class Frank Zahurones, 7156th Engineer Guard Company, testified that on the morning of 13 August 1947 he was the guard at Post No. 5, which was adjacent to the accused's post, from three o'clock until five o'clock. Post No. 5 was a stationary post. Post No. 4 was a walking post. Zahurones stated that while the accused was walking his post he heard "Gusik" whistling "Angelina." "Pretty soon over the fence in the woods someone whistled the same tune." Someone in the woods said "Tom," and close by there went forth a reply, "Franco." The accused was about 100 feet from the witness who asserted that he heard no other sound until "the shots came." He did not hear the command "halt" given at any time. About five minutes intervened between the time he heard the word "Franco" and the sound of the shots. Zahurones testified further as follows:

"Q. Did you see any Italians enter the depot about that time or just before the shooting?

"A. No, sir, I didn't.

"Q. Did you fire any shots?

"A. Yes, sir, I fired thirty rounds.

"Q. How long was that after Gusik had fired?

"A. He fired about fifteen or twenty rounds and then I started to shoot.

"Q. In which direction?

"A. Up toward the woods.

Respondent's Exhibit "A".

"Q. In which direction was Gusik firing?

"A. I believe he was firing toward the woods too." (R 32).

On cross-examination the witness testified as follows:

"Q. What were you firing at Zahurones?

"A. I couldn't see nothing. I was just firing out toward the woods.

"Q. Did you see or hear anything out in the direction that you fired?

"A. Over the fence I heard the woods crash. I was shooting out that way through the trees.

"Q. What type of weapon were you armed with?

"A. A carbine.

"Q. What type was the accused armed with?

"A. A carbine." (R 32)

Zahurones stated further that he recognized the accused's voice and that it was he who had called out, "Franco," but that he did not see anyone at that time. There were "about" four rows of vehicles between his position and "the post occupied by the accused" (R 33). In response to further questioning, Zahurones stated that he was about 100 feet from the accused when he heard the "conversation" but that he was about 12 feet away when the first shots were fired. The accused was about "four feet away from the fence" (R 34). On recross-examination the witness stated that he fired above the fence line into the woods but in the same general direction as the accused. He heard no shots until the accused began firing, but he did not see the accused when accused started firing because of the "vehicle" between him and accused (R 34, 35). The defense directed the following question and received the indicated answer from Zahurones:

"Q. Did you start firing simultaneously with the accused or did you start after he stopped?

"A. We were both shooting at the same time." (R 36)

Respondent's Exhibit "A".

Upon being reexamined by the court the witness stated that he was about fifty feet from the fence when he fired, and that he fired "right straight toward the fence and above the fence." He did not see "anything" along the fence as he "ran down." While firing, he held his piece at an angle of 45 or 50 degrees (R 36-37).

On 15 September 1947, Robert M. Urdinarrain, an agent of the Criminal Investigation Division, Leghorn, Italy, interviewed the accused. He testified that at this time he read to the accused the 24th Article of War, made no threats or promises to him, and that the accused made a written statement consisting of two pages which he voluntarily signed. Without objection, this statement was received in evidence as Prosecution Exhibit 5. It reads as follows:

"PORT OF LEGHORN
Office of the Provost Marshal
CRIMINAL INVESTIGATION DIVISION
APO 782 U. S. ARMY

"STATEMENT OF Pvt. THOMAS A. GUSIK,
RA 15220411, 7156th Engr., Guard Co Ovhd

In the Case 47/220
Given at 1600 hours (Time) 15 September 1947 (Date)
C.I.D. Office, Leghorn (Place)

In the presence of ROBERT M. URDINARRAIN, Agent, C.I.D.

"Officer taking statement: Thomas A GUSIK. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used

against you, should this investigation result in a trial. Do you understand what I have just said? (Answer): YES.

"I arrived in the Port of Leghorn on 26 December 1946. I was then sent to the 149th Replacement Depot, later on on 28th December 1946 I was transferred to the 88th Division to the 913th Field Artillery I then left the 88th Division on March 7th 1947. I was then stationed on Depot 2L76, with the 913th F.A., later I became the 7156 Engr. Guard Company. While I was with the 7156th, I came to know a certain FRANCO. I got to know him sometime in May 1947; the way I got to know this FRANCO was on May 1947, when he first approached me, and asked me if I wanted to sell any gas or tires. Then, in the month of June 1947, I made my first deal, with FRANCO, I told FRANCO what post I was going to be on, and at what time to come in. I do not recall the date and time, only that it was the early morning hours. I let FRANCO and two Italians named DI PINTO LUIGI, and MARCELLO get into the Depot. On this deal, the three Italians did not steal anything, due that they had not brought any tool with them, because they intended to take tires out. After this, FRANCO would approach me, but I did not make any deal with him, because I did not know what post I would be on. Then on the 11th of August 1947, I knew what Post I was going to be on. I then got a pass and went out to look for FRANCO, to tell him to bring his gang, so that the deal could be pulled. Instead I met MORO who I knew was one of FRANCO's men. I told MORO to tell FRANCO that I would be on Post No. 4, from 0300 hours to 0500 hours, 13th August 1947. MORO then told me that he would see FRANCO and tell him. I also told MORO to tell FRANCO to whistle the tune of Angelina; the tune Angelina was used

in both deals, I was involved. I was shown a statement given by WILLIAM E. HOAGLAND, by Agent URDINARRAIN, dated 4 September 1947, on one page and sworn to, on the 12th of August 1947, and confirmed the same on every detail, except the part where I said I'll get FRANCO. I have identified the photograph shown to me by Agent URDINARRIAN, as one of the two men I had spoken to as was mentioned in HOAGLAND statement. One of these two men, I later shot on 13th August 1947. I have seen this same man with FRANCO, when he approached me. Pvt. PARKER told me before going on guard the next day, that he also had made a deal with FRANCO. On 13th August 1947, I went on duty at 0300 hours, on Post No. 4. As soon as I got on my Post, I started to whistle "Angelina." While whistling (Angelina), I kept walking along the fence line, waiting for FRANCO to whistle (Angelina) so that I could give him the OK to come inside of the Depot. About half an hour later, I heard someone whistling (Angelina). I knew it was FRANCO and his gang. A few minutes later, FRANCO came out to the fence. FRANCO then told me "Where can I let them in?" I replied that he could not come in, because the O.D., Lt. BIRMINGHAM, was checking the area. FRANCO was mad because I had made a deal with him and then I did not want to go through with the deal. FRANCO then walked off into the woods. I then started to go towards Post No. 5, when someone fired upon me. I crawled under the stone crusher. I stayed under the stone crusher for a while, then I got behind the stone crusher, then I got up and walked towards Post No. 5, where ZAHURONES was. On my way to ZAHURONES, I heard someone by the fence, it sounded like someone was cutting the wire fence. I then saw some civilians enter the area. I shouted "Halt" but no

Respondent's Exhibit "A".

one stopped. I then halted the civilians the second time. This time the civilians started to go through the fence. I then fired at the civilians. I fired between ten to fifteen rounds, in my first burst, being that my gun had jamed (Cal. 30 Carbine T-4 No. 000571). On my second burst I fired about fifteen rounds. I then fired another clip, in order to get the Cpl. of the Guard to come to my Post, I fired three clips in all. The Cpl. of the Guard arrived (Cpl. SOPKO). The Cpl. and myself went outside of the fence, and brought in the two wounded Italians. After we had brought the two wounded Italians, I recognized one of the Italians to be the same man in the photography shown to me in the C.I.D. office. Later, the ambulance arrived and the two Italians where taken to the Hospital. I am positive that the shots fired from my gun killed the two Italians, because I was the closer one to them, and the first one to fire. Even though I had dealt with this group, headed by FRANCO, the reason I shot the two men was because they did not halt; the reason why I shot them was because they did not stop after I had hollered halt twice. The Halt business came after I had spoken to them the first time. I knew that PARKER was involved in about three or four deals, or more, because he told me so. I do not remember the exact details. I know that he was involved with many other members of the guard details, I do not remember the names.

Signature (s/ Thomas A. Gusik

"Subscribed and sworn to before me
this 15th of September 1947

/s/ John S. Strano 2nd Lt., C.M.P.
(Name (Rank)

SUMMARY COURT

Respondent's Exhibit "A".

"I certify that the 24th Article of War was read and thouroughly explained to the deponent by me prior to any questioning.

Signature /s/ R. M. Urdinnarain"

Urdinarrain examined Prosecution Exhibits 3 and 4 and stated that these were the photographs shown to accused at the time he made the foregoing statement (R 38).

After being advised of his rights as a witness in his own behalf by the court, and after he had conferred with counsel, the accused stated: "Sir, I wish to remain silent." No witnesses were presented by the defense (R 39).

After the court was opened, and the President had announced the findings of guilty and the sentence, the following colloquy occurred:

"President: The Court will recommend clemency in this case of Pvt. Gusik.

"Prosecution: That is the unanimous opinion of the court?

"President: It is"

The court thereupon adjourned on 9 October 1947 to meet at the call of the President.

4. **Discussion**

The functions of a general court-martial, duly constituted to hear and determine accusations against persons subject to military law, is briefly stated in the oath or affirmation administered to every member of the court prior to the trial of an accused. This oath is set forth in Article 19 of the Articles of War and is quoted in part as follows:

"You A. B. do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice,

without partiality, favor, or affection, according to the provisions of the rules and articles for the Government of the Armies of the U.S., and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding and the custom of war in like cases; * * *"

In the present case, the concurrence of at least two-thirds of the members present and voting was required for a conviction under each specification and the charge (AW 43; **Stout** v. **Hancock,** 146 Fed. (2nd) 741). Furthermore, "In order to convict of an offense the court must be satisfied, beyond a reasonable doubt, that the accused is guilty thereof." (MCM, 1928, par. 78, page 62.) The provisions of the Manual for Courts-Martial are no less applicable to a general court-martial than the Articles of War, insofar as such provisions are not inconsistent with the Articles of War (AW 38). (See also Sec. 1, Ch. II, Act of June 4, 1920 (41 Stat. 787), as amended.) A general court-martial, duly constituted and appointed by competent authority, having heard the evidence of sworn witnesses and having passed upon the strength, credibility and tendency of the evidence, has found that the accused did on 13 August 1947 near Tirrenia, Italy, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Salvatore Montalbano and Teodoro Moro, human beings; by shooting each with a carbine. The unanimous recommendation of the members of the court that clemency be granted the accused and the causing of such recommendation to be forwarded with the record of trial is authorized by military law (MCM, 1928, par. 81, p. 68) and is not, in any respect, inconsistent with the court's findings of guilty. Nor do the reasons which the court set forth as the basis for its recommendation tend to impeach its findings. Those reasons were stated as follows:

(a) The sentence was a mandatory sentence.
(b) The past record of the accused being of a very good nature until the time of the present offense.
(c) The young age of the accused, he being eighteen (18) years of age.
(d) The fact that the accused was on guard duty, regularly posted at the time of the offense.

Although the fact would appear tragic and shocking to the normal concepts of proper human behavior, we know of no reason why a soldier 18 years of age, in full control of his mental faculties, with a prior excellent record and being on guard duty could not, if he chose to do so, commit the crime of murder.

The function of the Board of Review in the Office of The Judge Advocate General in considering the legal sufficiency of a record of trial pursuant to the third paragraph of Article of War 50½, in which appellate category the present review falls, has been well defined and often stated.

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of the courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference. * * *
>
> "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure.

> It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen. * * *" (CM 212505, **Tipton**, 10 BR 237,244. See also CM 205920, **McCann**, 8 BR 239, 246; CM 322220, **Prentiss**.)

Bearing in mind the foregoing principles of law, we now consider the proof with respect to whether there be a reasonable basis for such inculpatory inferences as would tend legally to establish the findings of guilty. Two Italians known as Salvatore Montalbano and Teodoro Moro, members of a group engaged in illegal activities of which "Franco" was the leader, were mortally wounded on 13 August 1947 by gunfire at a place near the fence of Post No. 4 at Engineer Depot E 2L 76 at Tirrenia, Italy. They are shown to have died within a short period of time after having been fired upon. The accused was the guard on Post No. 4 at the time of the shooting and, according to Lieutenant Birmingham, the Officer of the Day, the accused readily admitted firing the fatal shots. After observing the hole cut in the fence near the bodies, and cognizant of the provisions of accused's special orders as heretofore set forth in this review, the Officer of the Day might well have assumed, even without ascertaining to a finality whether the accused had complied strictly to the letter of his orders by properly challenging the victims, that the killing was justified by the exigencies of the military service. He appears to have taken no action beyond having the bodies removed to the hospital and reporting the incident. This was on the morning of 13 August 1947. On 15 September 1947 the accused made his voluntary statement to agent Urdinnarrain. According to this statement, he had made his first "deal" with Franco in June, 1947, allowing Franco, Luigi and Marcello to come into the

depot, but they did not steal anything because they had no tools to remove the tires. On 11 August 1947 he procured a pass and went out to notify Franco to bring his gang so a "deal could be pulled." He met Moro whom he knew to be a member of Franco's gang, told him he would be on Post No. 4 from 0300 hours to 0500 hours on 13 August 1947 and asked him to tell Franco to whistle a tune of "Angelina," the signal they had used on their previous "deal". When the accused went on guard he began whistling the prearranged signal. About half an hour later, there was a response in kind from the woods, then Franco came to the fence. The statement of the accused as to the events transpiring after Franco came to the fence, and the testimony of the prosecution witnesses are in sharp conflict. Although admitting the firing of the fatal shots, the accused asserted that he told Franco that he could not come in because Lieutenant Birmingham was checking the area. Franco thereupon went back to the woods, the accused walked toward Post No. 5 and "someone fired upon me." He got under a stone crusher and stayed for a while, then came out and walked toward Zahurones on Post No. 5. He saw some civilians enter the area and he asserts that he shouted the command "halt" twice and when they started to go through the fence he fired about 15 rounds at them. After clearing his piece he fired a second burst of about 15 rounds. The accused stated that the reason he did this was because they did not stop after he "hollered halt twice." He was shown a statement made by Private First Class Hoagland and confirmed the same in every detail "except the part where I said I'll get Franco." It is significant that no witness in the case, including Zahurones, who was standing from 12 to 100 feet from the accused, ever heard any command "halt" or in fact any form of challenge given prior to the first burst of fire. Zahurones heard the accused whistling "Angelina" and the responding tune coming from the woods. He heard the word "Tom" coming from the outside and the reply "Franco" which

sounded "close" to him, but he "didn't hear anything else until the shots came." The court-martial resolved the conflict of evidence against the accused, it being apparent that by the findings of guilty of murder the court rejected accused's statement that he refused the Italians entrance, that he was fired upon from the woods, that he shouted "halt" twice and that he fired because the Italians failed to obey the command. It elected to believe the evidence showing that the Italians were told by the accused to come to the fence, to cut the wire and to enter, that while they were in the process of effecting their entry, accused, without warning, willfully and deliberately fired upon them and that two of their number were killed by shots fired from accused's weapon. We cannot reasonably conclude that the court did not have ample and substantial evidence upon which to base the findings of fact implicit in its verdict.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. ***" (MCM, 1928, par. 148a.)

The general rule is that the acts of one done in good faith, that is, without malice, in compliance with the orders of his superior are justifiable unless such orders are palpably unlawful or unless the acts are in excess of the authority delegated to him. And even though, in contemplation of the law, a particular act be in excess of his authority, reliance **in good faith** upon orders of a superior may well work a mitigation of a criminal offense thereby committed, as, if the act be a homicide, it may be manslaughter rather than murder (CM 265848, **Baugh**, 4 BR (NATO-MTO) 359, 365; CM 237827, **Green**, 1 BR (ETO) 345,368; **U.S.** v. **Clark**, 31 Fed. 710, 716; 40 C. J. S., p. 967 and cases there cited; **State** v. **Finch**, 177 N.C. 599, 99 S.E. 409, 414).

> "That the act charged as an offense was done in obedience to the order—verbal or written—

of a military superior, is, in general, a good defense in military law. The act, however, must have been **duly done**—must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent prisoners from passing his post, will not be justified in taking life or resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means; otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, etc., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon" (Winthrop's Military Law and Precedents (Reprint), p. 296).

In **United States** v. **Clark, supra,** the court quoted with approval the language of Mr. Justice Woodbury in **Wilkes** v. **Dinsman,** 7 How. 89, which was an action of trespass against Commodore Wilkes for causing the plaintiff to be whipped and imprisoned for disobedience of orders, near the Sandwich Islands, as follows:

"In respect to those compulsory duties while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been and never should be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. The officer, being entrusted with a discretion for public purposes, is not to be punished for the exercise of it, un-

less it is first proved against him, either that he exercised the power confided to him in cases without his jurisdiction, or in a manner not confided in him, as with malice, cruelty or willful oppression, or, in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error of judgment, but it must have been a willful and malicious error."

It will be seen, therefore, that, indispensable to the shield of immunity from criminal responsibility afforded one for homicide committed pursuant to lawful orders of his superior, and in the performance of a public duty, are the following:

(a) That the order or authority was lawful or of such character that he had a right under the circumstances to believe and did believe it to be lawful,
(b) That he acted reasonably within the scope of such authority, and
(c) Not with malice, cruelty, or by willful oppression flowing from a wicked heart.

Neither the validity nor the lawful character of accused's orders heretofore set forth is questioned. Upon the evidence the court determined that when accused fired some thirty rounds at the civilians "near the fence" he was not acting reasonably within the scope of his authority and furthermore that such shooting was accompanied by malice aforethought. With respect to the first proposition it has already been pointed out that none of the witnesses present at or near the scene of the homicide heard any challenge or warning of any description given prior to the shooting. And the proximity of the parties to each other and the fact that they heard other words spoken would indicate most strongly that had any challenge been given they would have heard it. Conse-

quently, we believe the court was warranted in coming to the conclusion that accused was not acting reasonably in due performance of his duties as a sentinel. As to the question of malice aforethought, that term has been variously defined by the courts and text writers and although the language employed may vary, the meaning is predominately the same. In the early case of **United States** v. **Carr** (25 Fed. Cas., pp. 306-309), wherein the authority of a sergeant of the guard to kill a drunken and riotous soldier was considered, the learned Circuit Judge, in charging the jury defined malice aforethought as follows:

> "Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved and malignant heart; a purpose to do a wicked act, and it may be either express or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases when no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law implies malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause. Although the malice in murder is what is called 'malice aforethought', yet there is no particular period of time during which it is

necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or do great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period." (See also **Comm.** v. **Chance,** 174 Mass. 245, 252; **Turner** v. **Comm.** 167 Ky. 365, 180 S.W. 768.)

It will be recalled that Private First Class Hoagland, the accused's companion on pass the day before the homicides were committed and who overheard the conversation by the accused with the Italian (Moro), testified that as they returned to camp some few hours later the accused told him, that he was going to get "Franco" because "Franco" had "screwed him out of a wrist watch." The accused asserted that he was shown a statement dated 4 September 1947 given by Private First Class Hoagland to agent Urdinarrain and "confirmed the same on every detail, except the part where I said I'll get Franco." Even if the foregoing be construed as a **denial** that he had made the statement which Hoagland testified to at the trial, yet the court was fully authorized in resolving this question of fact against the accused. In the light of the succeeding events, the statement amounts to express malice in law, although we are of the opinion that the facts and circumstances of the shooting as heretofore set forth, were such that the court could imply malice aforethought. (**State** v. **Orr,** 175 N.C. 773, 94 S. E. 721; **People** v. **Klein,** 305 Ill. 141, 137 N. E. 145; **State** v. **Finch, supra.**)

4. It is vigorously contended that the record contains incompetent evidence to such extent as to vitiate the findings of the court. Counsel have set out in detail such questions and answers as were considered incompetent and prejudicial to the accused's rights. We have given careful consideration to the portions of the testimony to which reference was made but deem it unnecessary to

reiterate each in this opinion. It is stated that some of the questions propounded on direct examination were leading, that the responses to other questions obviously were based on hearsay, some tending to show the commission of other offenses for which the accused was not on trial, that the answers given to some of the questions were not responsive and that other matters testified to were irrelevant and immaterial. It is conceded that the record contains some leading questions on direct examination. We cannot, however, lose sight of the realities of the trial, held on foreign soil. An interpreter was required and the common difficulties were encountered in the use of different languages. It is conceded that some of the answers were not responsive to the questions propounded and that the matter elicited from the witnesses was in some instances irrevelant, immaterial and, perhaps, based on conclusion.

> "The rule prohibiting leading questions in the examination in chief is to be liberally construed, and while as a rule leading questions are excluded, exceptions are recognized where witnesses are hostile, where they are weak of memory, where they are called to contradict, and where such a mode of questioning is logically consistent with a fair and honest development of the case, within, however, the discretion of the trial court." (Wharton's Crim. Ev. 11th Ed., Vol. 3, p. 2136.)

Article of War 37 provides in part as follows:

> "The proceedings of a court-marital shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any errof as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the

entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: ***"

The question therefore is reduced to a determination, under the 37th Article of War, as to whether the errors alluded to injuriously affected the accused's substantial rights. For answer to this question the Board of Review has consistently applied the "compelling evidence rule" as is hereinafter set forth:

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C. M. 127490 (1919).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient force as virtually to compel a finding of guilty, the finding should be disapproved. C. M. 130415 (1919)." (CM 211829, **Parnell**, 10 BR 142-143. See also CM 258073, **Allen**, 5 BR (ETO), 233, 236-237.)

Applying the above rule to the instant case, and eliminating from our consideration all evidence which might reasonably be considered of doubtful admissibility, we are of the opinion that the remaining competent evidence is of sufficient probative force as virtually to compel the findings of guilty and that such findings should not be disturbed (CM 258073, **Allen, Supra**).

It is contended by counsel for the accused in their brief that "conceding that the court had a right to disbelieve the accused's statement that he cried 'Halt,' especially in view of the evidence to the contrary, the evidence gives rise to no other inference than that he shot in order to prevent the unlawful entrance of the Italians into the depot. Since he failed to comply with the Post Special Orders requiring him to 'challenge' before firing (Pros Ex 1), he is deprived of whatever protection those orders would have afforded him. He stands, then, in a position of one who shoots in order to prevent the commission of a felony attempted by force or surprise. Such a killing is justifiable and does not constitute a crime (MCM 1928, par. 148a; Clark and Marshall, Law of Crimes (4th Ed. 1940), Sec. 266)." (Defense Brief, p. 10.) Although it is true that a homicide may be justifiable when committed in good faith in order to prevent the perpetration of a violent felony attempted by force or surprise, even though the particular felony is directed primarily against property and not against the person (**Ex parte Dickson,** 14 Fed (2d) 609; **Comm. v. Beverly,** 237 Ky. 35, 34 S.W. (2nd) 941, 40 C.J.S., p. 960-961), an exhaustive review of the cases wherein this principle of law has been invoked discloses factual situations entirely different from those shown to exist in the instant case, for here the court had before it ample and compelling evidence that the accused did not take the lives of his victims in order to prevent a felony, but, rather, that he was impelled to fire the fatal shots out of personal venom towards the group of Italians of which the two deceased were a part, a venom in no wise con-

nected with accused's call of duty and which is denounced by the law as the malice aforethought which forms the essential ingredient of the crime of murder. (CM 281592, Tracey, 54 BR 179.)

Counsel appearing before the Board of Review in behalf of accused have argued that the record of trial is barren of evidence tending to establish that accused took the lives of the two Italians with premeditation. Premeditation is not an element of murder either at common law or under the 92nd Article of War. There are no degrees of **murder** in military law (CM 319168, **Poe**; CM 294141, **Wesley**, 16 BR (ETO) 327, 332; **Commonwealth** v. **Webster**, 5 Cush. (Mass.) 295, 304; MCM 1928, par. 148a). However, we are of the opinion that the record contains ample proof of premeditation.

It was argued by able counsel in their appearance before the Board of Review that the accused did not have adequate counsel at the trial and that defense counsel displayed such apathy or indifference to accused's interests as to amount of a deprivation of his right to counsel. We find no substantial basis in the record for this conclusion. The assistant defense counsel appears to have been excused from the trial for reason of being on other official business. Upon being tried by general court-martial an accused is entitled to one or more assistant defense counsels "when necessary" (AW 11). The record shows that the accused stated that he desired to be defended by the regularly appointed defense counsel and the question of the necessity for the presence of an assistant was never raised. It is a matter of record in this office that the defense counsel in this case has had prior experience in court-martial practice and although the record of trial does not show whether he was a qualified lawyer in civilian life, a license to practice law in the civil courts is not a prerequisite to the performance of the duties of either trial judge advocate or defense counsel in a military court (AW 17; **Romero** v. **Squier**, 133 Fed (2d) 528). We cannot reasonably con-

clude that the election of the accused to remain silent, after having had his rights as a witness explained to him, and after conferring with his counsel, was other than the exercise of prudence and sound judgment on the part of the defense. And the failure of the defense to present any witness does not raise any presumption that there were any witnesses whose testimony would have improved the accused's position. With respect to character evidence the court assumed and declared in its recommendation to the reviewing authority that the accused's past record was "of a very good nature up until the time of the present offense." It is the duty of defense counsel for the accused before a military court to perform such duties as usually devolve upon a counsel for a defendant before civil courts in criminal cases and "to represent the accused with undivided fidelity" (MCM 1928, par. 45b, p. 35). Although legal minds might differ as to the most advantageous manner in which to defend any given case, we find no reason to conclude that defense counsel herein failed to perform his duties as heretofore stated.

We have given careful consideration to all other matters presented by counsel for the accused by way of brief and oral arguments upon their appearance before the Board of Review.

5. The Court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by

penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

Chester D. Silvers, Judge Advocate
Carlos E. McAfee, Judge Advocate
Gilbert G. Ackroyd, Judge Advocate

34

GCMO 32

GENERAL COURT-MARTIAL
ORDERS, No. 32

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., 26 January 1948

Before a general court martial convened at Leghorn, Italy, 9 October 1947, pursuant to paragraph 6, Special Orders No. 50, 6 October 1947, Headquarters Port of Leghorn, APO 512, United States Army, was arraigned and tried—

Private *Thomas A. Gusik*, RA 15220411, 7156th Engineer Guard Company (Overhead).

CHARGE: "Violation of the 92nd Article of War."

Specification 1.—"In that Private *Thomas A. Gusik*, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine."

Specification 2.—"In that Private *Thomas A. Gusik*, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine."

PLEAS

To *Specification 1* of the CHARGE: "Not guilty."
To *Specification 2* of the CHARGE: "Not guilty."
To the CHARGE: "Not guilty."

FINDINGS

Of *Specification 1* of the CHARGE: "Guilty."
Of *Specification 2* of the CHARGE: "Guilty."
Of the CHARGE: "Guilty."

SENTENCE

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The sentence was adjudged on 9 October 1947.

The reviewing authority approved the sentence and designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The period of confinement is reduced to sixteen years. Article of War 50½ having been complied with the sentence as thus modified will be duly executed.

BY ORDER OF THE SECRETARY OF THE ARMY:

OFFICIAL:
EDWARD F. WITSELL
Major General
The Adjutant General

DWIGHT D. EISENHOWER
Chief of Staff, United States Army.

AGO 1309B—Feb. 771937°—48

U. S. GOVERNMENT PRINTING OFFICE: 1948

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Respondent's Exhibit "A".

HEADQUARTERS
PORT OF LEGHORN
UNITED STATES ARMY
APO 512

18 September 1947

AG 201 — Gusik, Thomas A. (Enl)

SUBJECT: Investigation of Charges.

TO: 1st Lt. William A. Calfee, Investigating Officer.
Headquarters Port of Leghorn, APO 512, U. S. Army.

1. You are hereby designated to investigate and report upon the attached charges against Gusik, Thomas A., RA 15 220 411, Private, 7156th Engineer Guard Company (Overhead).

2. The investigation and report of W.D., A.G.O. Form No. 120 will be made in accordance with the provisions of paragraph 33a, MCM.

BY ORDER OF COLONEL ORSINGER:

William V. Cornett
1st Lt., JAGD,
Asst. Adj. Gen.

Incls:
1. Charge Sheets & Allied Papers.
2. Statement Forms (3)
3. Investigation Officer's Report Form (3)

PRETRIAL INVESTIGATING OFFICER'S REPORT

Received 25 Sept. 1947 Judge Advocate.
1st Ind.

25 September, 1947

WILLIAM A. CALFEE, 1st Lt., Inf.,
Investigating Officer,

To: Commanding Officer,
Port of Leghorn, APO 512 U. S. Army.

1. I have investigated the inclosed charges dated 18 September 1947 against Gusik, Thomas A., RA 15-

Respondent's Exhibit "A".

220411, Private, 7156th Engineer Guard Company (Ovhd) in accordance with the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.

2. In the presence of the accused, I have examined all available witnesses and documentary evidence and have reduced the material testimony given by each witness, under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:

The accused stated that he did not desire to exercise his right to cross-examine any of the witnesses, nor did he desire to call any witness on his behalf at this time.

3. The substance of the expected testimony of the following-named witnesses either in oral or written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused: Zelmira Del Monte, 23, Via S. Maria, Pisa, Italy. John S. Strano, Agent Criminal Investigations division, Leghorn, Italy. R. M. Urdinarrain, Agent, Criminal Investigations Division, Leghorn, Italy. 1st Lt. Paul A. Blankenship, 7156th Engineer Guard Company (Ovhd). S/Sgt. Laurien Gagnon, 7156th Eng. Guard Co. (Ovhd). Sgt. Andrew F. Sopko, 7156th Eng. Guard Co. (Ovhd). Pfc. George Mattheus, 1170th Eng.

Respondent's Exhibit "A".

Hqs. & Sv. Co. Pfc. William E. Hoagland, 7156th Eng. Guard Co. (Ovhd). Pfc. Frank Zahurones, 7156th Eng. Guard Co. (Ovhd). Pvt. Ursl B. Parker, 7156th Eng. Guard Co. (Ovhd). Di Pinto Luigi, 10, Via Stazza, Bagnoli, Italy. A. Alvaro, Marina di Pisa, A. Colombini, A. Collauro, A. Vitetta, all of 14th MP Co., 2 L 76.

4. The following documents have been examined, shown to the accused, and are appended:

Statement of the accused dated 15 Sept. 1947.
Guard roster for 12 Aug. 1947.
Depot. Sentry orders dated 20 July 1947
Photograph of victims
Diagram of area
Autopsy reports dated 14 August 1947 of Medical Department, University of Pisa.

W. D., A. G. O. Form No. 120*
17 July 1944

*This form supersedes W. D., A. G. O. Form No. 120, 5 January 1943, which may be used until existing stocks are exhausted.

5. The accused, after he had been carefully warned by me as above indicated, *said that he did not desire to make a statement — or — *made the statement hereto attached, (Ex. ———.)

*Strike out words not applicable.

6. Explanatory or extenuating circumstances: NONE.

7. There is no reasonable ground for a belief that the accused is now, or was at the time of the commission of the alleged offense (s), mentally defective, deranged, or abnormal.

8. Trial by GENERAL COURT-MARTIAL is accordingly recommended.

9. There is not attached a record of ——— previous convictions committed during the current enlistment

and within one year preceding the commission of the offense for which the accused is now charged. (Par. 79, MCM.)

10. In arriving at my conclusions, I have considered not only the nature of the offenses and the evidence in this case, but I have likewise considered the age of the accused, his military service, the necessity for preserving the manpower of the Nation in the present emergency, of salvaging all possible military material, and the established policy of the War Department that trial by general court martial will be resorted to only when the charges can be disposed of in no other manner consistent with military discipline.

William A. Calfee,
(Signature)
WILLIAM A. CALFEE,
(Name, typed)
1st Lt., Inf., JA Section, MTCUS.
(Grade and organization)

SUMMARY OF EVIDENCE OF EXPECTED TESTIMONY

Case of Private Thomas A. Gusik

1. Pfc. William E. Hoagland, 7156th Engineer Guard Company, will testify that on the night of 12 August 1947 he was with the accused Gusik, when the latter contacted two Italian civilians. The accused told the civilians to inform "Franco" that he was going to be a member of the guard and was going to be posted on Post No. 4 as second relief on the next day. The accused told the civilians that Franco should whistle the tune of "Angelina" upon approaching the accused, so that he could be recognized. When the civilians left the accused told Pfc. Hoagland that he was going to get "Franco" because he had "screwed him on a deal involving a wristwatch."

Respondent's Exhibit "A".

2.- Luigi Del Pinto, 10, Via Stazza, Bagnoli, Italy, will testify that he is the brother of Franco Del Pinto who was the ring-leader of a gang which in collusion with the guards perpetrated various thefts in Depot 2L76. On 13 August 1947, pursuant to an agreement made between his brother and the accused, he went with some other members of the gang to Depot 2L76. Upon arriving in the vicinity of Post No. 4 of the Depot, Franco talked to the accused who was a sentinel on that post. The accused gave them permission to enter the Depot and two members of the gang cut the wire surrounding the Depot. When Franco and another member of the gang whose name was "Moro" started through the fence the accused started to shoot at them. At that time two members of the gang, Montalbano and Moro, were hit and fell.

3. Alessandri Alvaro, 6, Via Araino, Marina di Pisa, Italy, will testify that he was a member of the gang headed by Franco del Pinto. He will further testify that on 13 August 1947, pursuant to a prearranged plan made by the accused and by Franco he went with other members of the gang to Depot 2L76. Upon arriving at Depot 2L76 Franco started to whistle "Angelina" and the accused answered by whistling the same tune. Having obtained permission by the accused to enter the Depot they started in. While going through the fence they were fired upon by the accused. Alvaro went to hide himself behind a cement-mixer and from there he could see the accused ask some Italian guards to help him carry the bodies of the two civilians who had been hit, Moro and Montalbano, into the Depot. The Italian guards did not agree to do that, and the accused himself, helped by some other American personnel carried the bodies inside the Depot. The tools used to cut the fence, and a jack which was going to be used to remove wheels from vehicles by the thieves, were put by the accused beside the bodies. While carrying the body of Montalbano, one of Montalbano's shoes remained in the hand of the

accused, and was later placed near the body. The accused and the other guards who helped him carry the bodies into the Depot, searched the victims and took the packages of cigarettes they had on them.

4. Adolfo Colombini, Angelo Cellauri, and Antonio Vitetta, all Italian guards, members of the 14th Military Police Company, will testify that on 13 August 1947, they were on duty at Depot 2L76. They heard someone whistling the tune "Angelina" and the accused whistling the same tune. They then heard the accused talking with someone. Shortly thereafter they heard shots and saw two civilians being hit by the gun fire who fell to the ground.

5. Pfc. Frank Zahurones, 7156th Engineer Guard Company, will testify that on 13 August 1947 he was a sentinel on Post No. 5, Depot 2L76. He heard the tune "Angelina" being whistled and when the whistling stopped he heard someone calling "Tom" and then he heard somebody else answering "Franco." He later heard some shots and went to hide himself behind a truck. He then was instructed to notify the Sergeant of the Guard. The Sergeant of the Guard instructed the guards to carry the wounded men inside the Depot, so that they could be given medical attention.

6. Sgt. Andrew F. Spoko, 7156th Engineer Guard Company, will testify that on 13 August 1947 he was Corporal of the Guard at Depot 2L76. At about 0335 hours he heard some shots near Post No. 4. Investigation revealed that Pvt. Gusik had shot some civilians. He saw that one of the wounded men was already dead and the other one was seriously wounded. He tried to stop the bleeding from the wound of the man who was still alive. The two men were taken by ambulance to the hospital in Pisa, where the doctor declared both men dead. The bodies were taken then to the morgue, located at 33 Via Roma, Pisa.

7. Pfc. George Mattheus, 1170th Engineer Headquarters and Service Company, will testify that on the

morning of 13 August 1947 he drove the ambulance which carried two wounded Italian civilians to the hospital. The doctor pronounced the two civilians dead as they arrived at the hospital.

8. Professor Idelae Del Carpio, of the University of Pisa, will testify that on 14 August 1947 he performed the post mortem on the bodies of Salvatore Montaibano and of an unidentified civilian known as "Il Moro di Brindisi". The autopsy revealed that both the men had died from gun shot wounds.

9. Agent John S. Strano, and Agent Urdinarrain, CID, Leghorn, will testify that after having warned the accused of his rights under the 24th Article of War, they obtained a statement from him. In this statement, dated 15 September 1947, the accused admitted to have made an agreement with Franco to let Franco and his gang enter Depot 2L76 and accomplish thefts therein. He stated that on 13 August 1947 pursuant to the agreement Franco and his gang approached the Depot and he did not let them in because the Officer of the Day was in the area. Later the thieves returned and he challenged them, as they did not stop, he fired at them.

William A. Calfee
1st Lt., Infantry
Investigating Officer

WAC/gp

DEPORTAL ROUTING SLIP

Log:

HEADQUARTERS
MEDITERRANEAN THEATER OF OPERATIONS
UNITED STATES ARMY
APO 512

File

Suspense:

SUBJECT: C.I.D. - P/L - Case # 47/201.

No.	From	Phone	To	Date	
1	C/A CID Leghorn Field Office.	147	SJA P/L APO 782	17 Sept 1947	1. In reference to the attached Case C.I.D. P/L No. 47/201; A certificate of loss is not enclosed in the above mentioned Case. 2. Due to administrative difficulties involved in the procurement of the necessary certificate of loss from Depot 2L76, the certificate of loss will be forwarded at a later date, as Enclosure #22. Henry L. Manfredi HENRY L. MANFREDI, Chief Agent, CID, Leghorn Field Office.

CONFIDENTIAL

HEADQUARTERS

CRIMINAL INVESTIGATION DIVISION

APO 782 — U. S. ARMY

Classification changed - cancelled
Date MAR 5 1948
By

This case originated at:	Case No.
Depot 2L76	CID - P/L - 47/201
Report made at: Leghorn, Italy — Date Forwarded: 16 Sept. 1947	Period for which made: 13 August - 15 September 1947
Title: (Name(s) of accused or victim(s)) Pvt. THOMAS A. GUSIK (W) ASN RA-15220411, 7156th Engr. Guard Company (Ovhd) (Accused) MORO TEODORO (Victim) MONTALBANO SALVATORE (Victim)	Character of case: (offense(s)) HOMICIDE Conspiracy to Commit Larceny.

Synopsis of facts:

On the 13th of August 1947, this Office was notified from Depot 2L76 to the effect that two (2) Italians had been shot by a United States Army Guard of said Depot, at approximately 0335 hours, on the 13th of August 1947, while attempting to commit a felony within the guarded Depot Area.

Investigation by this Office revealed that two Italians were shot; one died instantly; and the other later on. The dead Italians were identified as MORO TEODORO di Ignoto and fu Moro Maria, residing at Brindisi, Italy; and MONTALBANO SALVATORE di Vincenzo and di Agioni Giovanna, residing at Palermo, Sicily.

Further investigation disclosed that there were seven Italians, who entered 2L76 Depot, on the 13th of August 1947, at approximately 0330 hours. Following are the names of the seven Italians who entered Depot 2L76, after having obtained permission from the duly accredited guard, on Post #4, Pvt. THOMAS A. GUSIK (W):

1 - MORO Teodoro, di Ignoto and fu Moro Maria; (dead)
2 - MONTALBANO Salvatore di Vincenzo and di Agioni Giovanna (dead);
3 - DI PINTO Francesco, di Gaspare and di Tronconi Anna (at large);
4 - DI PINTO Luigi, di Gaspare and di Tronconi Anna (apprehended);
5 - VOLTERRANI Marcello, di Virgilio and di Guaini Anna (at large);
6 - ALESSANDRI Alvaro, fu Amedeo and fu Scapigliati Ersilia (apprehended);
7 - "CIRO THE NEAPOLITAN" (Unidentified at this time), (at large).

Report made by:
ROBERT M. URDINARAIN,
Agent, C.I.D.

Approved and forwarded:
HENRY L. MANFREDI,
Chief Agent, CID,
Leghorn.

Do not write here:
File Grade

Distribution of Report:
2 - SAC, P/L, APO 782
1 - C.O. Depot 2L76, APO 782
1 - C.O. 7156th Engr. Guard Co. APO 782
1 - P.M. P/L, APO 782
1 - Claim Commission, HTOUSA, APO 512
1 - Hqs. 7102nd CID Pltn., APO 782
2 - File, CID Leghorn Field Office.

CID Form No. 1

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HEADQUARTERS

CRIMINAL INVESTIGATION DIVISION

APO — U. S. ARMY

MAR 5 1948

This case originated at:	Case No.
Report made at: Date Forwarded:	Period for which made:
Title: (Name(s) of accused or victim(s)	Character of case: (offense(s)

Synopsis of facts:

Three members of the gang are still at large, they are namely : DI PINTO FRANCESCO; VOLTERRANI MARCELLO; and "CIRO THE NAPOLITAN".

Investigation further revealed that the guard Pvt. THOMAS A. GUSIK, had made a pre-arranged plan with said Italians to enter Depot 2L76, in order to steal U.S.Army Property, therein.

Pvt. THOMAS A. GUSIK, ASN RA-15220411, was confined to the PITOUSA D.T.C., on 3rd September 1947, pending Court Martial by the proper Authority.

Efforts are being continued by this Office to locate and identify the purchasers of the stolen U.S. Government Property, from 2L76.

All of the Italians herein reported, were denounced to the Italian Judiciary Authorities for theft, by the Italian Police attached to this Office.

Case Closed.

Report made by:	Do not write here: File Grade
Approved and forwarded:	Distribution of Report:

CID Form No. 1

CONFIDENTIAL

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TO : S.J.A.
MEDUSA, APO 512

Case 47-201

INVESTIGATION SUMMARY
C.I.D. REPORT

Classification changed - cancelled
Date: MAR 5 1948
By

Military Personnel Involved

NAME	RANK	ASN	ORG.	TEL #.
THOMAS A. GUSIK	Pvt.	15220411	7156 Engr. Guard Co.	685

Italian Personnel involved:

NAMES	ADDRESSES	STATES
DI PINTO LUIGI	Via Stazza #10, Naples, Bagnoli	Apprehended
ALESSANDRI ALVARO	Via Arnino, Marina di Pisa	Apprehended
DI PINTO FRANCESCO	Bagnoli, (Naples)	At Large
VOLTERRANI MARCELLO	Via Eldobrando Orlandi #2, Mar. Pisa	At Large
GIRO THE NAPOLITAN		At Large
MORO TEODORO	Carovigno (Brindisi) Italy	Dead
MONTALBANO SALVATORE	Vicolo S. Chiara #27, Palermo, Sicily	Dead

Nature of Offense : Homicide, Conspiracy to Commit Larceny.
Place of Offense : Depot 2L76, Post #4. Tirrenia Italy
Dates of Offenses : 13th August 1947.
Place : Post N.4, Depot 2L76.

EVIDENCE TO PROVE HOMICIDE AND LARCENY - Witnesses :

NAMES	ADDRESSES
DI PINTO LUIGI	Via Stazza #10, Bagnoli (Naples)
ALESSANDRI ALVARO	Via Arnino, Marina di Pisa
COLOMBINI ADOLFO	14th M.P. Co., 6th Group Bn., 2L76
CILIBERO ANGELO	14th M.P. Co., 6th Group Bn., 2L76
MISTRETTA ANTONIO	14th M.P. Co., 6th Group Bn., 2L76
DEL MONTE PALMIRA	Via S. Maria #23, Pisa.

Other Witnesses, American :

NAMES	RANK	ASN	ORG.	TEL.
ANDREW T. SOPKO	S-Sgt.	16210350	7156 Engr. Guard Co.	685
GEORGE MATTHEWS	Pfc.	34004474	1170th Engr. Maint. Co.	685
CARL P. PAINTER	Pvt.	14126170	7156 Engr. Guard Co.	685
WILLIAM T. MCFARLAND	Pfc.	15255	7156 Engr. Guard Co.	685
FRANK CATSIMANES	Pfc.	16015	7156 Engr. Guard Co.	685
[illegible]	S/Sgt.	0142	7156 Engr. Guard Co.	685

Other Witnesses, Italian :

NAMES	ADDRESSES
DI PINTO LUIGI	Via Stazza #10, Bagnoli (Naples)
ALESSANDRI ALVARO	Via Arnino, Marina di Pisa
COLOMBINI ADOLFO	14th M.P. Co., 6th Group Bn., 2L76
CILIBERO ANGELO	14th M.P. Co., 6th Group Bn., 2L76
MISTRETTA ANTONIO	14th M.P. Co., 6th Group Bn., 2L76
DEL MONTE PALMIRA	Via S. Maria #23, Pisa.

Prof Ideale del Carpio, University of Pisa

1st Lt. Paul C. Blechinszki 715-L Guard Co (Local)

CONFIDENTIAL

Respondent's Exhibit "A".

CONFIDENTIAL

Classification — cancelled
Date—Mar. 5, 1948
By—Elwood W. Sargent

DETAILS:

1. On the 13th of August 1947, this Office received a report from Depot 2L76, APO 782, to the effect that two (2) Italians had been shot and killed by an American Guard of said Depot, at approximately 0335 hours, on the 13th August 1947, while attempting to commit a felony within the Depot Area.

2. Investigation revealed that the two Italian victims were identified as: MORO TEODORO di Ignoto and fu Moro Maria; residing at Carovigno (Brindisi), Italy; and MONTALBANO SALVATORE di Vincenzo and di Agiani Giovanna, residing at Vicolo S. China No. 27 (Palermo), Sicily.

3. Further investigation disclosed that there had been seven (7) Italians involved in ~~this~~ incident. They are namely: DI PINTO LUIGI di Caspare and di Tronconi Anna, residing at Via Stazza No. 10, Bagnoli (Naples); DI PINTO FRANCESCO (Alias "FRANCO") di Caspare and di Tronconi Anna, residing at Bagnoli (Naples); VOLTERRANI MARCELLO di Virgilio and di Orsini Anna, residing at Marina di Pisa, Via Eldobrando Orlandi No. 2; ALESSANDRI ALVARO, fu Amedeo and fu Scapigliati, residing at Marina di Pisa; an Italian from Naples only known as "CIRO" at this time; and the two dead men.

4. The two victims were taken to the Pisa Hospital by Pfc. GEORGE MATTHEMI, ASN 34094474, 1170th H. & S. Co., Engr. Regt., and Sgt. ANDREW SOPKO, ASN 16210390, 7156th Engr. Guard Co., Depot 2L76. (Incl. No. 1 & 2.)

5. The victims MONTALBANO SALVATORE and MORO TEODORO were pronounced dead on the 13th of August 1947, by Prof. IDEALE DEL CARPIO. (Incls No. 3 & 4.)

Respondent's Exhibit "A".

6. The autopsy performed on the body of MORO TEODORO, disclosed that he had been shot four times. The autopsy on MONTALBANO SALVATORE revealed that he had been shot two times. The autopsies were accomplished by Prof. IDEALE DEL CARPIO. (Incls. No. 5 & 6.)

7. On the 14th of August 1947, a statement was obtained from DI PINTO LUIGI di Caspare and di Tronconi Anna, residing at Bagnoli, Via Stoppa No. 10 (Naples), at which time he stated as follows: That he was a member of the gang, which was comprised of FRANCO, his brother, who was the ring leader, MORO TEODORO, MONTALBANO, and MARCELLO; that on 12 August 1947, FRANCO had told him that he (FRANCO) had made arrangements for 13 August 1947, with the guards on Posts No. 4 & No. 5 of Depot 2L76, and that the above mentioned group was to be permitted by the Guards, to steal inside of said Depot; that this was not the first time they had stolen from 2L76; that the group had stolen U. S. Government Property from the Depot on several occasions, prior to the shooting; that arrangements had always been made with the guards on Post; that on the 13th August 1947, the above mentioned group proceeded to the rear of Depot 2L76; That FRANCO left the group in the woods near the wire fence while he (FRANCO) walked to the fence and talked to the guard on Post No. 4; that the group was posted in the woods between Post No. 4 and Post No. 5; that FRANCO asked the guard on Post No. 4 if it was all right to be permitted inside the Depot in order to steal; that the guard gave FRANCO the OK; that FRANCO then came back to where the group was posted, and instructed them that everything was OK, and that the group could proceed to steal; that they all walked up to the wire fence and MARCELLO started to cut the fence with a pair of wire cutters; that MARCELLO was successful in cutting a hole through the fence; that MARCELLO was the first one to go through the hole; that

when FRANCO and MORO started to go through the fence, the guard started to shoot at the group; that he saw MORO and MONTALBANO receive wounds as the result of the shooting; that FRANCO then ran into the woods and hid in a ditch close to MORO who was lying there wounded; that the guards fired for about ten minutes; that he effected his escape a short time before the shooting ceased; that he identified the American guard in the CID Office, as the same soldier that his brother (FRANCO) had made arrangements with, in order to have FRANCO's group enter the Depot, for the express purpose of committing felonies therein.

8. DEL MONTE PALMIRA was interrogated by the Italian Police attached to this Office. She states that an unknown civilian gave her a note to transmit to ALESSANDRI ALVARO. The note stated that ALVARO was to contact a lawyer since he was as equally involved in the affair, which was culminated with the death of MORO and MONTALBANO. She cannot identify the person who gave her the note. She, however, states that the note was given by her to membrs of the Italian Police in Pisa, whom she cannot identify. (Incl. No. 12).

9. It is also interesting to note that PARKER engaged DEL MONTE ZALMIRA in conversation, during the delivery of said note. PARKER at the time was making efforts to learn the whereabouts of a large sum of money which was entrusted to ALVARO (Incl. No. 13). PARKER'S activities will be reported in Case CID P/L 47/220.

10. ALESSANDRI ALVARO, another component of the gang, who had attempted to commit larceny on the morning of 13 August 1947, was interrogated by Agents of this Office. He admitted his part in the attempted theft the morning of the shooting. He also admitted having taken part in a number of thefts in 2L76, on other occasions; that he was in the Depot having been permitted to enter the morning of the shooting; that everything was pre-arranged with the

guards, to enter the Depot; that after FRANCO spoke to one of the guards, he (FRANCO) told the group everything was all set to enter the Depot; that shortly thereafter, and precisely after he entered, the shooting started; that he effected his escape later on that day by paying an Italian guard; that he cannot identify the Italian guard (Incl., No. 8).

11. A number of Italian Military Guards, were also interrogated by Agents of this Office, regarding any pertinent information which might shed some light on the incident. COLOMBINI and CELLAURO, Italian Military Guards, both state that one of the civilians was observed by them engaged in conversation with one of the U. S. Military Government Guards. However, both of these men cannot identify the U. S. Military Guard; that the civilian who was observed by them, engaged in conversation with the guard was the man who was shot and wounded mortally; that some whistling as if to denote signalling, was heard PRIOR to the shooting by said guards. (Incls. No. 9 and No. 10).

12. VITELLA ANTONIO, an other Italian Military Guard, practically states in substance the same as COLOMBINI and VITELLA. (Incl. No. 11).

13. An interesting insight was uncovered during the interrogation of WILLIAM E. HOAGLAND. He states that GUSIK and he, left Camp at about 1900 hours, on 12 August 1947, a day before the shooting; that he was present when GUSIK spoke to two unidentified Italians; that GUSIK asked the Italians if they knew a certain "FRANCO"; that the two Italians replied "Yes"; that the two Italians were instructed to convey to FRANCO, that he (GUSIK) would be on Post No. 4 the following day on the second relief; that they were told that the signal would be the tune of "Angelina"; that this would be definite evidence that he (GUSIK) would be dealing with FRANCO; that after GUSIK terminated his conversation with the Italians he told him (HOAGLAND) that he (GUSIK) was going to get

FRANCO because he had screwed him on a deal involving a wristwatch; that the next day he (HOAGLAND) had learned that GUSIK had shot two Italians (Incl. No. 14).

14. On 15 September 1947, GUSIK was thoroughly interrogated and he stated as follows: That he knew a certain FRANCO for a period of time; that he conspired with FRANCO and his group to commit larceny in Depot 2L76, consummating same on a number of occasions; that he, however, did not permit this group to remove any Government Property; that he admitted talking to MORO TEODORO and another unidentified civilian in the presence of HOAGLAND, the day before the shooting which occurred on 13 August 1947; that the conversation was regarding a larceny which was to be committed on the 13th August 1947; that he was going to get FRANCO for failing to pay him (GUSIK) for a watch which he sold to FRANCO; that he remembered talking to him (FRANCO) about getting into the Depot the night of the shooting; that he told FRANCO that the deal was off; that FRANCO went back in the underbrush and shortly thereafter a shot was fired in his (GUSIK) direction; that he noticed the same Italians approach the fence; that he hollered halt twice and then fired in their direction mortally wounding two of this group; that one of the two men shot and killed by him, was identified as MORO TEODORO, the Italian with whom he had spoken to on the 12th August, in the presence of HOAGLAND (Incl. No. 15).

15. An anonymous letter was addressed to this Office and is inclosed herewith as Inclosure No. 16.

16. A certificate regarding the weapons and ammunitions used by THOMAS A. GUSIK, the night of 12-13 August 1947, was obtained by this Office (Incl. No. 18).

17. An extract of Special Orders for Posts, dated 20 July 1947, is inclosed as Inclosure No. 19.

18. Pfc. FRANKO ZAHURONES was interrogated and stated as follows: That on 13th August 1947, he was on Post No. 5 and was talking to Pvt. GUSIK who was on Post No. 4; that he heard the tune "Angelina"; that the whistling stopped and he heard some one calling "TOM" (GUSIK); that then some one replied "FRANCO"; that a few minutes later he heard some shooting; that he (ZAHURONES) hid behind a truck, then shortly thereafter he warned the Cpl. of the Guard; that he was informed by the Cpl. of the Guard to advise the Sgt. of the Guard; that he was instructed by the Sgt. of the Guard, and the O.D., to bring the wounded men into the Depot, so medical attention could be facilitated more rapidly (Incls. No. 20 & No. 21).

19. A search is being continued by Agents of this Office and the Italian Police for FRANCO; DI PINTO FRANCESCO (Alias FRANCO); "CIRO the Neapolitan"; and VOLTERRANI MARCELLO.

20. The two Italians who engaged DEL MONTE ZALMIRA in conversation in a Bar in Tirrenia in the presence of PARKER, still remain unidentified.

21. A certificate of loss regarding Government Property, was obtained from Depot 2L76, which concerns the period from 1st January to 31st August 1947, and is attached herewith as Inclosure No. 22.

22. A search is being made to identify and locate the Italian civilians who were the ultimate purchasers of the U. S. Government Property, stolen from 2L76, over a period of time.

23. This investigation has disclosed that many members of the 2L76 Guard Complement were included in a series of thefts with Italian civilians over a protracted period. This investigation has been recorded as CID P/L 47-220, and will be reported under separate cover.

CONCLUSIONS:

According to the facts contained in this investigation, it can be concluded that:

Respondent's Exhibit "A".

1. Pvt. THOMAS A. GUSIK did conspire with a group of Italian Civilians, herein reported, in order to commit larcenies in 2L76; consumating same on a number of occasions, prior to 13 August 1947.

2. Pvt. GUSIK did conspire to commit larceny with a group of Italian Civilians, herein reported, which was expected to be consummated on 13 August 1947.

3. Pvt. GUSIK altered his plans, according to his own testimony, at the last moment after effecting the prearranged signals with the Italian civilians herein reported, who had planned to enter Depot 2L76, on said night, in order to commit larcenies therein. As a result of this change in plans, Pvt. GUSIK shot and mortally wounded two members of his gang, namely: MORO TEODORO and MONTALBANO SALVATORE.

Robert M. Urdinarrain,
Agent, C.I.D.

21 Inclosures:

1 — Statement of ANDREW F. SORKO, Sgt.
2 — Statement of GEORGE MATTHEUS, Pfc.
3 — Death Certificate of MONTALBANO SALVATORE.
4 — Death Certificate of MORO TEODORO.
5 — Autopsy Report of MONTALBANO SALVATORE.
6 — Autopsy Report of MORO TEODORO.
7 — Statement of DI PINTO LUIGI.
8 — Statement of ALESSANDRI ALVARO.
9 — Statement of COLOMBINI ADOLFO.
10 — Statement of CELLAURO ANGELO.
11 — Statement of VITETTA ANTONIO.
12 — Statement of DEL MONTE ZALMIRA.
13 — Statement of URSL B. PARKER, Pvt. (Written in: "Where is it?")
14 — Statement of WILLIAM E. HOAGLAND, Pfc.
15 — Statement of THOMAS A. GUSIK, Pvt.
16 — Anonymous Letter.

Respondent's Exhibit "A".

17 – Duty Roster.
18 – Certificate of LT. BLANKENSHIP.
19 – Extract of Special Guard Orders, dated 20th July 1947.
20 – Statement of FRANK ZAHURONES, Pfc.
21 – Statement of LAURIER GAGNON, S/Sgt.

5 Exhibits:
A – Scene where Pvt. GUSIK first saw the thieves, inside of Depot 2L76;
B – Scene of shooting where the thieves broke into the Depot 2L76 on 13 August 1947;
C – Photograph of MONTALBANO SALVATORE;
D – Photograph of MORO TEODORO;
E – Map Area of Depot 2L76.

OFFICE OF THE PROVOST MARSHAL
CRIMINAL INVESTIGATION DIVISION
APO 782 U.S. ARMY
(Mar. 5, 1948 by Elwood W. Sargent.)

STATEMENT OF ANDREW F. SOPKO, Sgt.,
16270390; 7156 Engr. Guard Co.
in the Case 47 - 220
given at 1030 hours 12th September 1947
(Time) (Date)
C.I.D. Office, Leghorn
(Place)

in the presence of ROBERT M. URDINARRAIN,
Agent, C.I.D.

Officer taking Statement: ANDREW F. SOPKO. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you should this investigation result in a trial. Do you understand what I have just said? (Answer) YES.

Respondent's Exhibit "A".

While on Guard on the night of the twelvth to the thirteenth of August, I was on duty as corporal of the Guard from 0300 hours to 0500 hours. About 0335 hours, I heard some firing in the 5b area, after receiving orders from the officer of the day, I went to the area to investigate. When I arrived, Pfc. GUSIK approached and he told me he thought he shot an Italian civilian because he could hear someone moaning just outside of the fence. After finding this to be true, I told him to contact the guard-house and notify the officer of the day that someone was shot. When the officer arrived with the Sgt. of the Guard, we went directly to the fence to investigate. I then climbed through an opening in the fence and using a flashlight, went up to the ditch and found two men lying there. Waiting for others to come through the fence, Pfc. GUSIK and myself went to the people mentioned and found that one was dead and the other still living. We then took the living man inside of the fence and using my compress, I tried to stop the bleeding. We then went back and brought in the other and when the ambulance came, placed them inside. I accompanied the ambulance to Pisa and upon arriving at the hospital, we were met by two enlisted men of the 90th M.P.'S. They took down a statement made by myself while the doctor pronounced both of the men dead. We then took them to the mortuary at 33 Via Roma and turned them over to the caretaker there. After a search of the personal effects, it was found that only one of the men had any identification and this was also turned over to the caretaker after an inspection by the interpeter that accompanied the MP'S, and myself. We then returned to the unit.

Signature Sgt. Andrew F. Sopko.

Subscribed and sworn to before me
this 16 day of Sept. 1947.

Ellwood R. Lambert, 1st Lt. C. E., Ass't. Adj.
(Name) (Rank)

Respondent's Exhibit "A".

SUMMARY COURT.

I certify that the 24th Article of War, was read and thoroughly explained to the deponent by me prior to any questioning.

Signature R. M. Urdinarrain.

Incl. No. 1

OFFICE OF THE PROVOST MARSHAL
CRIMINAL INVESTIGATION DIVISION
APO 782 U.S. ARMY
(Mar. 5, 1948 by Elwood W. Sargent.)

STATEMENT OF GEORGE MATTHEUS, Pfc., 34094474, 1170th Engr. H & S Co.
in the Case 47 - 220
given at 1030 hours 12 Sept. 1947
(Time) (Date)
C.I.D. Office, Leghorn
(Place)
in the presence of ROBERT M. URDINARRAIN, Agent, C.I.D.

Officer taking statement: GEORGE MATTHEUS: Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say, may be used against you, should this investigation result in a trial. Do you understand what I have just said? (Answer) YES.

On the morning of 13 August 1947, I was on duty as Ambulance driver at the Dispensary at Engineer Depot 2L76. At approximately 0350 hours, I received a call from Depot Security that some one was shot, in the 5-B Area. I immediately answered the call and upon arrival at Guard Post No. 4, I found two Italians. When I examined them, I found one was dead and the other still

Respondent's Exhibit "A".

living. I gave first aid to the wounded man and loaded both in the ambulance, and with the Cpl. of the Guard, proceeded to Pisa, Italy, to the Civilian Hospital. There the Medical Doctor (Italian) pronounced both men dead. Then, after the Cpl. of the Guard had finished his business, we returned to the depot. Both of these victims were inside of the Depot, when I arrived.

Signature George Mattheus.

Subscribed and sworn to before me
this 16 day of September 1947.

Ellwood R. Lambert, 1st Lt. C. E., Ass't. Adj.
(Name) (Rank)

SUMMARY COURT

I certify that the 24th Article of War was read and thoroughly explained to the deponent by me prior to any questioning.

Signature, R. M. Urdinarrain.

Incl. No. 2

(Mar. 5, 1948 by Elwood W. Sargent.)

UNIVERSITY OF PISA
INSTITUTE OF LEGAL MEDICINE
AND OF INSURANCES.

Pisa, 14 August 1947.

As per request of the Leghorn C.I.D. Field Office, we certify that young MONTALBANO Salvatore di Vincenzo died during the night 12-13 August 1947, as a result of GSW.

In faith.
s/ Prof. Ideale del Carpio
(Prof. Ideale del Carpio)

Translated from the original Italian into English to the best of my knowledge and ability.

Anna M. Ascarelli, Interpreter CID.

Incl. No. 3.

Respondent's Exhibit "A".

(Mar. 5, 1948 by Elwood W. Sargent.)

UNIVERSITY OF PISA
ISTITUTO DI MEDICINA LEGALE
E DELLE ASSICURAZIONI

Pisa, 14 August 1947

It is hereby certified, per request of the Leghorn CID Office, that an unknown young male, referred to by witnesses as "il Moro di Brindisi", died during the night from 12 to 13 August 1947, as a result of GSW.

In faith.

s/ Ideale del Carpio
(Prof. Ideale del Carpio)

Translated from the original Italian into English to the best of my knowledge and ability.

Anna M. Ascarelli, Interpreter CID.

Incl. No. 4

(Mar. 5, 1948 by Elwood W. Sargent.)

UNIVERSITY OF PISA
Istituto di Medicina Legale e delle Assicurazioni

Pisa, 14 August 1947.

On 14 August 1947 an external examination and an autopsy was performed on the body of Montalbano Salvatore, died during the night 12-13 August in Tirrenia as a result of GSW. The external examination revealed two cutaneous wounds, with the characteristics of gun shot wounds, located anteriorly on the thorax, one in the vicinity of the jugulum, at the level of the insertion of the tendon of the right sterno-cleidus-mastoideous muscle (the hole had an ovoidal shape with the largest diameter of 17mm and the minor diameter of 12 mm); the other wound on the right para-sternal line at the level of the third rib (ovoidal and with the largest diameter of 20 mm and the minor of 18 mm). The autopsy limited to the cut of the thoracic and abdominal cavities, showed that the hole located on the emi-sternal line at

the level of the third rib, did not have a path but had a dead end without lesioning the bones, and in the muscular tissue we found the lacerated copper outside of a bullet. The hole located in vicinity of the jugulum is continued in a path thru the thoracic cavity which passes above the arc of the aorta artery cutting a large arterious branch of the left side, perforating the superior lobe of the left lung, entering in the vicinity of the apex and leaving it in the vicinity of the edge, at the level of the 4th inter-costal space, penetrates the muscular tissues of the thoracic wall ending under the corner of the left scapula where we found a fragment of steel irregularly shaped. A large amount of blood is found in the left pleurical cavity. No abnormal findings in the abdominal viscera, but characteristics of severe anemia. In this case death was caused by hemorrage produced by the pulmonar and vascular lesions. Said lesions were determined by a gun shot wound. Examination of the shell found in the tissues, although it is quite out of shape, led us to think that it was a small caliber bullet, 6-7 mm. The fact that we found the shell of the bullet and the lead of the nucleous lodged in two different places (with the formation of two wounds) made us assume that Montalbano was hit by a ricochetted bullet which, having hit a hard body lost its shape and broke in two different pieces which produced two wounds of different entity, they being of different mass and moving power. The path made by the steel is downward and from right to left. It is impossible to determine the distance from where the shot was fired. In consideration of the penetrating force of the lead nucleus of the bullet we must assume that the fire arm used was a long one, with one bullet only, most likely a war rifle.

s/ Prof. Idelae del Carpio

PROF. IDELAE DEL CARPIO

Translated from the original Italian into English to the best of my knowledge and ability.

Anna M. Ascarelli, Interpreter CID.

Incl. No. 5

Respondent's Exhibit "A".

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

UNIVERSITY OF PISA
Istituto di medicina legale e delle assicurazioni.

Pisa, 14 August 1947.

On 14 August 1947, an external examination and an autopsy were performed on the body of an unidentified young male, referred to by some people from Tirrenia, as "Il moro di Brindisi", who died in Tirrenia as a result of GSW. External examination showed four wounds with the characteristics of GSWs. Two of these wounds are located on the thorax, one on the left side, at the level of the 2nd rib, along the para-sternal line (ovoidal with diameters, the largest 6mm and the minor 4 mm), the other on the right emi-thorax, at the level of the 10th rib along the medium axillary line, slightly ovoidal (largest diameter 7mm, minor 6mm). The other two wounds are located on the posterior face of the left thigh, of them one is located higher, around the roots of the thigh and esactly 26 cm from the superior anterior iliac spine, round shaped with a diameter of 17 mm and the other one is located at 36 cm from the anterior superior iliac spine, and looks like a cut wound and was about 4,5 cm. long. The autopsy was limited to the thoracic and abdominal cavities. In the right pleurical we noticed a large amount of blood. In the pericardic cavity we noticed quite a large amount of blood. The pericardium is perforated in two places and the right auricle is lacerated. The right lung is lacerated on the inferior edge of the superior lobe. No abdominal viscera are wounded. On the basis of these data we may conclude that the death of the young unknown man was caused by hemorrage derivating from the cardiac lesions and the pulmunar ones. Said wounds were caused by GSW. We must think of a fire-arm with only one bullet, of small caliber (as it is demonstrated by the small size of the entrance

noie located on the left emithorax, at he level of the 2nd rib). Two shots hit the victim, and both of them produced wounds with full path, with entrance and exit holes, from left to right, downwards, The wound of the thigh might have been produced by a ricochetting bullet as it is demonstrated by the size of the lesions.

s/ Prof. Ideale del Carpio

Translated from the original Italian into English to the best of my knowledge and ability.

Anna M. Ascarelli, Interpreter CID.

Incl. No. 6.

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 14 August 1947.

I, the undersigned, DI PINTO Luigi, di Gaspare and di Tronconi Anna, born at Pozzuoli (Naples), on 14 September 1926, residing at Bagnoli, Via Stazza No. 10, mechanic apprentice, without any promises or threats, of my own free will, state as follows:

About 13 days ago, I arrived in Marina di Pisa together with my brother FRANCESCO, who however, was already in Tombolo, Tirrenia and Marina di Pisa zones. He told me that on Tombolo zone, where American Camps are located, was possible to steal easily. There were various types of material with which a lot of money could be earned. In fact, on the evening of the 12th c.m., my brother FRANCESCO informed me that at about 0300 hours, on the 13th c.m., it was possible to steal some cars tires at Camp 2L76; as he had already made arrangements with the sentries on duty at the Camp at said time at posts Nos. 4 & 5. On that same night we made arrangements with three other young men, who used to steal, and with whom we had previously stolen.

Respondent's Exhibit "A".

Two of these young men are from South Italy, and one from Pisa. The two from South Italy are named "Moro" whom I cannot identify farther and Montalbano Salvatore whose nick name was "Il Siciliano". After making agreements, we five left Marina di Pisa by bicycles towards Camp 2L76, going through the woods. "Moro" was riding on the bicycle driven by Marcello. As we reached the fence, on the wooded side, and exactly between posts No. 4 & No. 5, my brother approached the sentry on Post No. 4 and asked him if we could start, to work. Having the sentry's permission my brother came back to us then, the five of us went to the place, as previously designated, and MARCELLO, using big wire-cutters, cut the fence making a hole through which we could pass to enter the Camp. In the mean while, the sentry was moving towards Post No. 5. MARCELLO, passed through the hole in the fence and entered the Camp carrying a lug-wrench to take tires off. As soon as he got into the Camp, we four (I, my brother, the "Moro" and the "Siciliano") were in the immediate vicinity of the hole, intending to enter the Camp, we heard a lot of shooting from the side of Post No. 5. As a result of this shooting "Moro" and "Siciliano" were fatally wounded. I do not know in which direction MARCELLO, who already was in the Camp, went; I do not even know if he was wounded during the shooting. My brother ran away through the woods, while I, to avoid being wounded by the shooting, layed in a ditch in the vicinity of the fence, together with "Siciliano" and "Moro". The latter was very near to me and by the way he was crying I guessed he had been fatally wounded. I tried to help him, but with no result, and I was so scared that I could not stay in the place any more. In fact, about ten minutes later, while the sentries continued to fire, I ran away. "Il Siciliano" and "il Moro" remained on the place, into the ditch near the fence and hearing their crying I guessed that they did not have any hope to live. I could not specify whom the sentries were who fired upon us, but as stated before,

I supposed the shooting was coming from post No. 5. To make the theft easy, MARCELLO had brought a jack to take the tires from the trucks located at Depot 2L76, a lug-wrench, and a pair of wire-cutters. Said tools were abandoned on the place at the time of the escape, and those presented to me at this time (a jack and two lug-wrenches) I recognize to be the we brought to the place at the time the shooting occurred. On the evening of that same day, 13 c.m., before my apprehension, my brother informed me that "Il Moro" and "Il Siciliano" were dead as a result of the gun shot wounds, and that MARCELLO had been slightly wounded in the back.

Q.A. I cannot understand the reason why the sentry or sentries fired upon us, when they had previously agreed with us.

Q.A. When the shooting occurred, MARCELLO was already inside the Camp, and I suppose we kept on going inside to avoid the shooting. I cannot specify where he came out of the depot.

I recognize the American soldier shown to me, whose name I do not know, to be the same soldier who on the night of the attempted theft, gave us permission to enter the Camp, after my brother had talked to him at the end of the fence.

I have nothing further to state, and after reading my statement, in faith of what above, I sign below.

s/ De Pinto Luiti
s/ Campana Agostino, Brig.

Translated from the Italian into English to the best of my knowledge and ability.

Franca Piacentini,
Interpreter, C.I.D.

Incl. No. 7

Respondent's Exhibit "A".

C.I.D. Office

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 15 Sept. 1947.

I, the undersigned ALESSANDRI Alvaro, di fu Amedeo and di fu Scapigliati Ersilia, born in Pisa on the 6th Feb. 1912, there resident in Via S. Iacopo No. 4, 1st. floor, temporarely in Marina di Pisa, Via Arnino No. 6, with out any threats or promises but of my own free will, state what follows:

In addition to what declared in my precedent statement, which corresponds to the truth for what concerns the activity of DI PINTO FRANCO, of the two American soldiers of whom I knew one with the name of BOB and the other one with a tattooing on the arm, and the other civilians with these involved, I specify that I took part to the theft of tires perpetrated in the first part of the month of Aug., from Depot 2L76. The fact happened as follows:

DI PINTO FRANCO had an appointment with the American BOB, who while he (BOB) was on guard duty from 22:00 to 24:00 hrs., would let the a/m in the Depot to let him steal complete automobile wheels. DI PINTO FRANCO, after the accordance with the a/m BOB, came to my house, inviting me to take part to the robbery. So we left with MORO TEODORO, DI PINTO LUIGI, FRANCO'S BROTHER, a Neapolitan called Ciro, and VOLTERRANI MARCELLO, who gave us a ride with his car. Arrived in the locality called "CAPANNE BRUCIATE", in Tombolo, Franco went down from the car, and approached the fence walking at 2L76, between guard posts 5 & 6. The signal between DI PINTO FRANCO and BOB, was the song "Angelina" whistled from both sides. So Franco came back a few minutes later telling us that BOB was waiting for us.

Respondent's Exhibit "A".

We left all together, and arrived at the fence, DI PINTO FRANCO, VOLTERRANI MARCELLO, CIRO and MORO TEODORO, went inside the Depot, thru a hole already made in the wire fence, while I and DI PINTO LUIGI, remained out of the fence to wait for the friends to come out with the tires. About an half an hour later, VOLTERRANI MARCELLO and MORO TEODORO, came back with a truck tire for each one of them and after having been giving them to us, they went back into the Depot, for come back a little later, with two more tires complete of wheel and tube. The stuff was left temporarily in the woods, guarded by MORO TEODORO and DI PINTO LUIGI and CIRO, while I, CIRO and VOLTERRANI MARCELLO left with the car for Marina di Pisa with the intention to find buyers of the tires. I got down from the car in this last place to go back home, while VOLTERRANI MARCELLO and DI PINTO FRANCO, went to Pontasserchio. where they placed the tires. They got a total of 320,000 Lire an 100,000 Lire were given to BOB in my house, as reward. The remaining part was divided in equal parts.

Two days later of this fact, I remember the exact date, 12 Aug. in the evening, Franco met again the American soldier BOB, who gave him an appointment at 23:00 hrs. at post No. 2 where he was on duty, in order to get some mine tinder and other material that we could get. In the third night DI PINTO FRANCO, and MORO TEODORO met another American soldier to be unknown who proposed them to perpetrate a tire theft from 2L76, from 03:00 to 05:00 hrs. of the following 13 Aug., that was when he was on duty between posts No. 4 & 5. After such an agreemnt, DI PINTO FRANCO and MORO TEODORO took contacts with me and VOLTERRANI MARCELLO with DI PINTO LUIGI, with MORO TEODORO, with a certain MONTALBANO SALVATORE and the mention CIRO INVITING US ALL TO BE at Tirrenia at the Bus Station in front of Bar Torelli, at 22:00 hrs. On the night, we

were all there and then all together, we proceeded thru the inside roads of the woods, to go to see the American soldier on guard, that was BOB on post No. 2. There arrived, always whistling "Angelina" that was the signal, he approached the fence where he found BOB. DI PINTO FRANCO and CIRO, entered the Depot and accompanied by BOB went at Calambrone where there had to be the material to be stolen. While we were making these checkings, BOB noted still far, the inspection patrol. Worried about it, he told DI PINTO FRANCO and CIRO, to get out of the Depot, and so they did, coming with us waiting outside of the fence for their decisions.

Missed this operation, we left again on bicycles and we went to the place called "CAPANNE BRUCIATE" where we stopped for about two hours. In the mean time, the hour of the second appointment was near, the one taken by DI PINTO FRANCO and MORO TEODORO with the American soldier that was going to be on duty between posts 4 & 5. We entered the woods going toward the indicated place at about 03:10. DI PINTO FRANCO and MORO TEODORO approached the fence, whistling "Angelina" to which the guard answered. FRANCO and TEODORO approached the fence, took the last arrangements with the guard and after a few minutes, MORO TEODORO came to us, that had been looking at their conversation, from 30 meters far. He told us to approach because the arrangements were made. MORO TEODORO and VOLTERRANI MARCELLO, made a hole in the fence with a wire cutter and then there was a little of hesitation between us because nobody wanted to get in first. In the mean time, the guard, came back on the post, giving us all the explanations and telling us to enter freely, because the guards near his post were approving. I decided myself right away and when I had made standing down about a meter, inside of the Depot, the guard that had been giving us the assurances and with whom FRANCO

and TEODORO had been taking agreements with, for no reason opened fire on us with his carbine. MONTALBANO SALVATORE died right away, while MORO TEODORO was badly wounded, falling on the ground at the outside of the fence, hollering for help. The others ran away thru the woods, while I hid in the back of a big cement mixer that was there, to escape the shooting which lasted a few minutes, without that anybody could see me. From that place I could then see everything that was done by the guards after the shooting was over. I say guards because some Italian guards come over, and they probably were on duty in the vicinities. In fact, the American guard asked the Italian's help, to carry inside the Depot, the dead body and the wounded, but this refused, saying to be scared. In the mean time, another guard approached the two and the two Americans then pulled by the feet, the dead body of MONTALBANO SALVATORE and the wounded MORO TEODORO, who was visibly mortally wounded, by the way he was groaning. The same guards, perquisited the two bodies taking away two packs of cigarettes that they had in their pockets. In the mean time, one of them, that found a jack and a couple of wrenches out of the fence, smiling putted the tools near the dead and the wounded, just in order to make believable that MORO TEODORO and MONTALBANO SALVATORE, were shot inside the Depot and not out of the fence.

During the operation of the pulling of MONTALBANO's body, he lost a shoe which remained in the American guard's hand. The shoe was putted down as the a/m tools, inside the Depot.

About 20 minutes later, the inspection jeep came over, followed by an Ambulance which provided to the removal of the two bodies. I always remained hidden in back of the cement-mixer till 14:00 hours of the afternoon, without moving. Tired of remaining so firm, I approached an Italian guard who was in that zone. I asked him if he could let me thru the hole in the fence, and

seeing that the guard was doubtful, I promised the guard the reward of 20,000 Lire that I was going to give him the very night at Bar Torelli in Tirrenia. The guard accepted and before to get out, I gave him as a gift, about 16 American cigarettes. But the guard didn't come to the appointment fixed for the paying of the reward, and I didn't see him again. Maybe I could recognize him if I could see him again. I am not in grade to recognize the American guard that killed MONTALBANO and MORO.

I haven't anything further to add and in faith of what above stated, I sign below.

s/ ALLESANDRI ALVARO

s/ CAMPAN AGOSTINO.

Translated from the original Italian into English to the best of my knowledge and ability.

Raimondo Rossi
C.I.D. Interpreter.

Incl. No. 8

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 11 September 1947.

I, the undersigned, COLOMBINI ADOLFO, di Domenico and ———— Colombini, born at Talamona (Sondrio) on 21 September 1925, there residing at Via S. Giorgio No. 35, wood-chopper, at present under the Military Service, as Pvt., 14th M.P. Company, 6th Group Bn., stationed at the American Camp 2L76, without any promises or threats, of my own free will, state as follows:

On 13th August 1947, I was on guard duty on post No. 4, area 5-B, from 2400 hours to 0400 hours. At about 0330 hours, after the relief vehicle of the American guards passed, coming from the entrance of the Camp;

the American soldier on guard duty, came towards me walking very fast and asked me if I had seen or heard some civilians outside of the fence. As answered No, the American soldier walked fast along the fence towards post No. 3, whistling a happy tune. Short later, the American guard came back towards me, and told me to stand where I was and not to move. The Italian soldier CELLAURI ANGELO, also on guard on the same place, approached me and told me that he thought there was something suspicious, and suggested to open our eyes to watch what was going to happen. I told CELLAURI that the American soldier had told me not to move from my place. While CELLAURI and I were talking about this matter, we heard the noise of wire-cutters, cutting the wire-fence, and few minutes later I heard some bursts of automatic gun. I remained at my post, till when the shooting finished and an American soldier came to tell be to fire some shots in the air in order to call the attention of the Inspectors to come on the scene. In fact, I fired four shots in the air. Short later, The Italian and American Inspections came; and an autombulance which transported away a civilian who was dead, and another one who was wounded. The American soldier who approached me and told me not to move from my post did not promise any money to me, nor explained the reason why I should not move from my post.

I have nothing further to state, and after reading my statement, in faith of what above, I sign below.

s/ Colombini Adolfo

s/ Campana Agostino, Brig.
s/ Angelo Bastiani, Lt.

Translated from the original Italian into English to the best of my knowledge and ability.

Franca Piacentini
Interpreter, CID.

Incl. No. 9.

Respondent's Exhibit "A".

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 11 September 1947.

I, the undersigned, CELLAURO ANGELO, fu Luigi and di DESTRO PAOLA born at Naro (Agrigento), on 6 September 1925, there residing, Via Cellauro, farmman, at this time under Military Service, as Pvt., 14th M.P. Co., 6th Group Bn., stationed at American Camp 2L76, without any threats or promises, of my own free will, state as follows:

On the 13th August 1947, I was on guard duty at post No. 5, area 5-B, between 2400 hours and 0400 hours. At about 0300 hours, arrived the relief of the American guards, and the Guard whose post is inside Camp 5-B, as soon as got off the vehicle, fastly moved towards the fence, in the direction of Post No. 4. As his hurrying seemed unusual to me, I moved towards post No. 4 to watch what was happening. On doing so, I contacted the guards on post No. 4, Pvt. COLOMBINI, and asked him if he thought there was something suspicious in the air. COLOMBINI answered me that the American guard had asked him if he had heard or seen some civilians in the woods. The American was walking along the fence towards post No. 3, and was whistling in a high tune in order to be heard. Then, still whistling, came back the same way, and stopped to whistle short before reaching post No. 4. Then, while I was starting back to my post, I heard an acute whistle, coming from the woods. The American who was already together with an other American soldier, also on guard, moved very fastly from him; then both walked along the fence but in opposite directions. One of them, I cannot specify which one, started to talk to an individual near the fence, whom I could not see. This conversation was taken in a very low voice, and I could not understand because I do

Respondent's Exhibit "A".

not know the language and as I was about twenty meters far from them. As the presence of an individual near the fence at that time seemed suspicious to me, I decided to pay much attention to what was going to happen. Short later, I heard a noise produced but a wire-cutter contacting the wire fence. At this time, an individual, very near to the fence, who short before had talked to the American soldier, fell to the ground, as he had been shot by a burst fired with an automatic gun by one of the American soldiers, perhaps by the same one who short before had left the wire fence. Almost in the same time, also the other American soldier started to fire; the shooting continued for several minutes. Also from the woods, some shots were fired. I also fired with my gun towards the woods. Later the Italian and American Inspections, and an autoambulance came on the scene, and transported away the body of a civilian who was dead, and the body of an other one who was seriously wounded; both men had been found not too far one from the other, and almost touching the wire fence on the outside. I also specify that, at about 0300, that was short before the relief of the American guards, I heard some strange noises produced by leaves and twigs being stepped on, and the bark of a dog; however, I did not notice anybody near the fence.

I have nothing further to state, and in faith of what above, I sign with the sign of cross, after that Brigadiere of the Carabinieri CAMPANA AGOSTINO, has read the present statement, at the presence of Sgt. MIGLIORI SEBASTIANO, also of the 14th M.P. Company.

Sign of cross X of Cellauro Angelo

s/ Campana Agostino, Brig.
s/ Sgt. Migliori Sebastiano.

Translated by Franca Piacentini, Interpreter, CID

Incl. No. 10.

Respondent's Exhibit "A".

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 11 September 1947.

I, the undersigned, VITETTA ANTONIO, di Francesco and di Vitetta Angela, born at Rome, on the 16th September 1925, there residing, Via Urbana No. 99, 2nd Floor, pastry-cook, at present under Military Service, as pvt., 14th M.P. Co., 6th Group Bn., stationed at American Camp 2L76, without any threats or promises, of my own free will, state as follows:

I was on guard duty at Post No. 3, Area 5-B, on the 13th August 1947, between 2400 hours and 0400 hours, and was walking, as usual, between the vehicles, when I heard suspicious noises coming from the woods. Short later, the American soldier on duty at the Camp, walked from post No. 4 and post No. 3; along the fence, whistling in a strange manner, on his way on and back. On his way back, the American soldier stopped, and he must have been talking to some person who were outside the depot fence, whom I could not see and did not see. About half an hour later, I heard a shooting. I started to be alerted, trying to understand what was happening. I saw some persons running towards the woods, and started to fire against their indistinct shapes. Some burst were fired with tommy-gun, from post No. 4. However, I remained at my post (No 3).

I have nothing further to state, and after reading my statement, in faith of what above, I sign below.

s/ Vitetta Antonio.

s/ Campana Agostino, Brig.
s/ Sgt. Miglione Sebastiano

Translated from the original Italian into English to the best of my knowledge and ability.

Franca Piacentini
Interpreter, CID.

Incl. No. 11.

Respondent's Exhibit "A".

Classification
— cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

Leghorn, 11 September 1947.

I, the undersigned, DEL MONTE ZALMIRA, di Alpinolo and di Sbrana Dorina, born at S. Giuliano Terme (Pisa) on 24th May 1924, residing at Pisa, Via S. Maria No. 25 3rd floor, without any threats or promises, of my own free will, state as follows:

On the 27th or 28th August 1947, at about 0700 hours, I went to the Torelli Bar, at Tirrenia. As soon as I entered, an American soldier told me to approach him; later on I found out that his name was PARKER, who was in the ame Company with a certain MARIO, Sgt. of the Italian Military Police. The American asked me if I knew MORO TEODORO, killed during a shooting at Depot 2L76, on the 13th August. He asked me where MORO had left his money as he knew that MORO owned more than one million lire. I answered that I knew MORO, but I did not know where he had left the money. The same American offered me coffee, and, while I was standing in the entrance of the Bar, an Italian man from South Italy approached me and asked if I knew a certain ALVARO, fruit-vender from Marina di Pisa, to whom he was to give a note written by certain FRANCO DI PINTO. When I said that I knew him, the unidentified man gave me the note and the responsibility to give it to the so named ALVARO. In the note, if I remember correctly, was written more or less the following: "Dear ALVARO, since you are more involved in the matter, try to get a lawyer for my brother LUIGI, who is now in the DOMENICANI Jail. Use MORO's money for this. Go to lawyer DA PRATO because he knows everything. If you do not do this, he will act in a vindictive manner. My Post Office deposit book has been taken away and I do not even have a lire in my

pocket. Regards, FRANCO". The unknown man went away and when I returned to sit and drink my coffee, the American, PARKER, asked me what the conversation was all about. I answered: "It is a note written by FRANCO and ALVARO and it is my intention to turn it over to the Italian Police". The American opposed this, adding that the necessities of food, money and cigarettes for FRANCO's brother, would be his worrings because he had very friendly relations with this same FRANCO. He also told me to bring the stuff concerned to DI PINTO LUIGI, tomorrow; but I reacted contrarily and he then said that he would go personally. At this time, he turned to MARIO, the Italian Sgt., asking him if he would do it. MARIO did not object, because being a Sgt. of the Italian Military Police, no one would question him. During the conversation, another American soldier came in and talked to PARKER in English; according to my interpretation he informed PARKER that he was being sought by the American Police. At this notification, PARKER hid behind the screen in the Bar, and told MARIO to call a taxi for him to go away. In fact, MARIO called the vehicle and both of them went in the direction of Marini di Pisa.

I have nothing further to state and after reading my statement, in faith of what above, I sign below.

s/ Del Monte Zelmira

s/ Luigi Nesti, Brig.

Translated by Franca Piacentini,
Interpreter, CID.

Incl. No. 12.

Respondent's Exhibit "A".

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

STATEMENT OF Pvt. URSL B. PARKER, 14186130, 7156 (ovhd) Go. Co.
In the Case 47 - 220
Given at (Time) 1710 hours (Date) 20 August 1947
(Place) C.I.D. Office

In the presence of Pvt. Charles C. HOY, 11147071, 7156 (ovhd) Gd. Co.

Officer taking the Statement: Pvt. Ursl B. Parker. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statement, whatever you say may be used against you, should this investigation result in a trial. Do you understand what I have just said? (Answer) Yes.

About the 1st of March 1947, I went AWOL from Co., "B", 1st Bn., 350th Regt. 88 Div., stationed at Kande, Venezia Giulia. I was apprehended on 8 May 1947, in Gorizia, Italy. I was later Court Martialed and given a sentence of two and one half months at DTC, MTOUSA. I was returned to duty with the 913th F.A.Bn. at Depot 2L76. I pulled my first deal with a soldier, Pfc. FENNELL, of my Organization; he and I were the only two guards in Area 5-B, of Depot 2L76, and we sold four tires to an Italian named FRANKO. Pvt. GUSIK made the deal with FRANKO, and got about fifteen thousand lire for his part. Pfc. FENNELL and I got one hundred and five thousand lire for our part which we split between us. About the fourth or fifth or August 1947, Pfc. GIBSON, an Italian Guard (Name unknown) and I, made another deal with FRANKO. The deal involved eight tires which were removed from area 14-B. FRANKO brought

six more Italians with him and took eight tires out of the Area 14-B. The pay-off was supposed to be two hundred thousand lire, but FRANK only paid off one hundred thousand that night. I was supposed to collect the other hundred thousand lire that night but never went back to collect. I gave the Italian guard fifteen thousand lire, and Pfc. GIBSON and I split the rest of the hundred thousand lire evenly. About two nights later, I was on Post No. 2, and Pvt. John MARTINEZ contacted FRANKO and told him to come to my post at 2300 hours. The deal was for dynamite caps. FRANKO brought his gang to the Depot that night, but the O.D. came around and they did not get anything. FRANKO and his gang left, but came back to the fence later, after the O.D. had left. I told FRANKO that Pvt. GUSIK had said for him to come to his post (Post No. 4) at 0300 hours, and he and his gang could work from 0300 until 0500 hours stealing tires. FRANKO and his men left in the direction of Post No. 4. I was releaved from my post at 0100 hrs., and later that night, Pvt. GUSIK shot two of FRANKO's men at Post No. 4. An Italian Guard on duty at the same place as Pvt. GUSIK, told me that he had seen everything that happened on Pvt. GUSIK's Post that night. The Italian Guard told me that Pvt. GUSIK was whistling Angelina when FRANKO and his gang came to the fence, and that FRANKO whistled the same thing back; that FRANKO talked to GUSIK and GUSIK told FRANKO to wait a minute; and GUSIK told the Italian guards, of which there were five, not to shoot because FRANKO and his gang were coming in; that GUSIK told FRANKO and his men to come on in, so they cut the fence and one Italian entered; that the other Italians saw someone lying under a truck and did not want to come in, but GUSIK told them it was O.K. to come on in. As the Italians started to come in, Pvt. GUSIK put a round in the chamber of his carbine and the Italian became alarmed and some of them started running; that Pvt. GUSIK started firing and killed two of the Italians and

wounded another the arm; that one Italian left inside paid another Italian guard twenty thousand lire to get out. I made one deal, before the last one I mentioned with Pvt. John MARTINEZ I do not remember the date but it was about the 1st of August 1947; this deal was with FRANKO also. Pvt. MARTINEZ was on Post No. 4 and let FRANKO take out two tires, I did not get anything out of the deal as it was to be for Pvt. MARTINEZ. FRANKO paid Pvt. MARTINEZ eight thousand lire that night and was supposed to give him more later, but never did. Last night the 29th August 1947, Pvt. HOY, Pvt. FREELS, Pvt. BEIGLER, Pvt. CLEM, Pvt. WHITE, two Italian guards, and myself, made a deal with an Italian AMILIO who has a gang of six Italians. AMILIO and his gang were let into the Depot by us and they stole seven tires, and a typewriter. We did not get paid for last night as payment was to be made to us after AMILIO sold the stuff. I know that Pvt. WHITE is not an operator and I am sure he has never been in on a deal. I mentioned him before, because he knew AMILIO and his gang were in the depot, and was trying to get us to get them out. He was not included in the deal at all and we did not intend for him to know about the Italians being in the Depot, but Pvt. WHITE came on Post before AMILIO and his gang finished.

s/ Ursl B. Parker

Subscribed and sworn to before me
this 2nd day of September 1947.

s/ John S. Strano. 2nd Lt., CMP.
SUMMARY COURT

I certify that the 24th Article of War was read and thouroughly explained by me to the deponent prior to any questioning.

s/ Samuel B. Whitmire, Agent, CID.

"A TRUE COPY"
JOHN S. STRANO,
2nd Lt., CMP.
Incl. No. 13.

Respondent's Exhibit "A".

C.I.D. OFFICE

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

STATEMENT OF WILLIAM E. HOAGLAND, Pfc.

15355376, 7156 Guard Co.
In the case 47 - 220
given at (Time) 1300 hours (Date) 4th September 1947. Place) CID Office, Leghorn

in the presence of Robert M. URDINARRAIN, Agent, CID.

Officer taking statement: William E. HOAGLAND. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you, should this investigation result in a trial. Do you understand what I have just said? (Answer) YES. W.E.H.

On 12th August 1947, I had a pass to leave my Co. 7156 Guard Co. I went to tour with Pvt. GUSIK. We left Camp at about 1900 hours; we then went to a Hotel near the Camp and had some food. After we finished eating, we left the Hotel and started to walk towards Leghorn; after we had walked about two hundred yards, Pvt. GUSIK saw two Italians on the other side of the road; GUSIK said he wanted to talk to the two Italians for a minute; we then crossed the street and went over to the two Italians. Pvt. GUSIK then asked the two Italians if they knew a certain Italian by the name of FRANKO; the two Italians replied "Yes"; then Pvt. GUSIK told the two Italians to tell FRANKO, that he (GUSIK) would be at Post No. 4, tomorrow on the second relief, and to tell FRANKO to whistle a verse of Angelina, and tell FRANKO that after he whistled An-

Respondent's Exhibit "A".

gelina he would whistle the rest of the verse of Angelina; that why GUSIK would know it was FRANKO. After GUSIK got finished talking to the Italians, we started back towards Camp. On the way back to Camp, GUSIK told me "I am going to get FRANKO, now, because he screwed me out of a wrist watch", we then went back to Camp. The next day, August 13, 1947, at about 0630, I heard that Pvt. GUSIK had shot two Italians, this is all I know about this incident. I do not recall the date, only that it was a dance night, which we have Tuesday and Saturday; it was one of these dances that T/5 WEAVER told me that he had taken a truck to Leghorn, this is all WEAVER told me; there was a rumor in Camp that WEAVER sold this truck.

Signature William E. Hoagland

Subscribed and sworn to before me
this 12th day of Sept. 1947.

Junius C. Layson 1st Lt.
(Name) (Rank)
SUMMARY COURT

I certify that the 24th Article of War was read and thouroughly explained to the deponent by me prior to any questioning.

Signature R. M. Urdinarrain

Incl. No. 14.

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

This letter is sent to your organization as a clarification of the occurrence in the area of the Allied Military Camp 2L76 and in which two of my friends died.

The day preceding the incident, I met an American soldier Tam, who lives in that camp, and it was agreed

that during that same night, we would meet in that vicinity and more precisely, in Sectors 5 and 6, to load some tires which he himself would give us. The price for his aid was established at Lire 30,000, which we gave to him. At 0310 hours we went to the designated place. We were listening for the signal of the American soldier and then we heard the tune "Angiolina" being whistled, and I myself approached the wire surrounding the camp. The American told me to call my friends and to bring back the necessary tools. I did this, and while we were piercing the wire to enter the camp, this same American, hidden behind a truck, began to fire upon us, with results that you already know about. After our two friends were shot and lying dead, the other guards began shooting, but we the survivors already had gone away from the place. I write the above statements to put the case in light, to show the criminal activity the soldier TAM and if we were to fault in some respects, they were very slight in comparison to the action which had taken place that tragic night. In testimony of what I have said in this letter, showing the criminality of certain proceedings, you can question the Italin sentries who were on duty at the Camp during that night, as they heard everything including the tune Angiolina being whistled by the American as the signal of agreement.

In faith of what above.

s/ Illegible

Translated from the original Italian in English to the best of my knowledge and ability.

Albert Mazzullo,
Interpreter, C.I.D.

Incl. No. 16.

Respondent's Exhibit "A".

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

HEADQUARTERS
7156 ENGINEER GUARD COMPANY (OVHD)
APO 782 US ARMY

13 August 1947

CERTIFICATE

I certify that the weapon and ammunition used by Thomas A. Gusik, 15 220 411, was issued from unit supply for purpose of performing Guard duty. Pvt. Gusik was a member of the Guard 12, 13 August.

s/ Paul E. Blankenship
t/ PAUL E. BLANKENSHIP
1st Lt FA
7156 Engr Guard Co (Ovhd)
Commanding

"A TRUE COPY"
JOHN S. STRANO
2nd Lt., CMP

Incl. 18.

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

C.I.D. OFFICE

STATEMENT OF FRANK ZAHURONES, Pfc. ASN 16215622, 7156 Guard Co.

In the Case 47 - 220
given at (Time) 1330 hours (Date) 4 September 1947
(Place) C.I.D. Office, Leghorn

Respondent's Exhibit "A".

in the presence of ROBERT M. URDINARRAIN, Agent, CID.

Officer taking Statement: Frank Zahurones. Under the 24th Article of War, it is my duty to warn you of your rights in this Case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you should this investigation result in a trial. Do you understand what I have just said? (Answer) YES. F.Z.

On 13th August 1947, I went on duty on Post No. 5, at depot 2L76, while I was on my post, I was talking to Pvt. GUSIK who was on post No. 4. GUSIK and I were talking for a while. I then walked away to the end of my posts. A few minutes later I heard someone whistling the tune of Angelina; it seemed that one person would whistle a verse, then some one else would take up the tune. The whistling sounded that it was near then it took up, like from the woods. Then the whistling stopped and I heard someone say, Thom, then someone replied, Franko. A few minutes later, I heard some shooting. I then hid behind a truck, while I was behind the truck, I saw something move in the grass outside of the fence. I fired about thirty rounds above the moving grass; whether there was someone out in the woods or not, I do not know. After the shooting stopped, I walked out the road, and fired a few shots in the air, to see if the Cpl. of the Guard would arrive. I then holled for the Cpl. A few minutes later the Cpl. of the guard arrived, Sgt. SOPKO, then told me to get the Sgt. of the Guard, but as I started to get the Sgt. of the guard, a jeep pulled up, with the O.D. and the Sgt. of the Guard. I then went to the fence line and heard someone moaning. The O.D. told GUSIK and the Cpl. of the Guard to bring the wounded men inside of the Depot and see if anything could be done for them. I later was told to go back to the ——, my post.

Signature Frank Zahurones

Respondent's Exhibit "A".

Subscribed and sworn to before me
this 12th day of Sept. 1947.

Junius C. Layson 1st Lt.
(Name) (Rank)
SUMMARY COURT

I certify that the 24th Article of War was read and thoroughly explained by me to the deponent prior to any questioning.

Signature R. M. Urdinarrain

Incl. No. 20.

Classification
charged — cancelled
Date—MAR. 5, 1948
By—Elwood W. Sargent

OFFICE OF THE PROVOST MARSHAL
CRIMINAL INVESTIGATION DIVISION
APO 782 U. S. ARMY

STATEMENT OF LAURIER GAGNON, S/Sgt., 614-2061, 7156 Engr. Guard Company

In the Case 47 - 220
Given at (Time) 1035 hours (Date) 12th Sept. 1947
(Place) C.I.D. Office, Leghorn

In the presence of ROBERT M. URDINARRAIN, Agent, C.I.D.

Officer taking statement: LAURIER GAGNON. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you should this investigation result in a trial. Do you understand what I have just said? (Answer) YES.

Respondent's Exhibit "A".

WHILE on Sgt. of the Guard I S/Sgt. LAURIER B. GAGNON at 0330 hrs. investigated shooting in area 5b. Arriving there I found the sentry Pvt. THOMAS GUSIK and the Cpl. of the Guard Sgt. ANDREW SOPKO on the fence line. Pvt. GUSIK reported that he had shot at some Italians trying to enter the compound. We could hear moaning on the other side of the fence. Investigating we saw two Italians laying in the ditch. One looked like he was dead but the other still showed signs of life so I went after the medic. The medic came in a ambulance and took them to a hospital in Pisa. The Cpl. of the Guard went with the ambulance. When I arrived at the scene of the shooting the two wounded Italians were outside of the fence laying in a ditch.

Signature Laurier B. Gagnon

Subscribed and sworn to before me
this 16 day of Sept. 1947.

Ellwood R. Lambert Lt LPCE
Asst Adj.
SUMMARY COURT

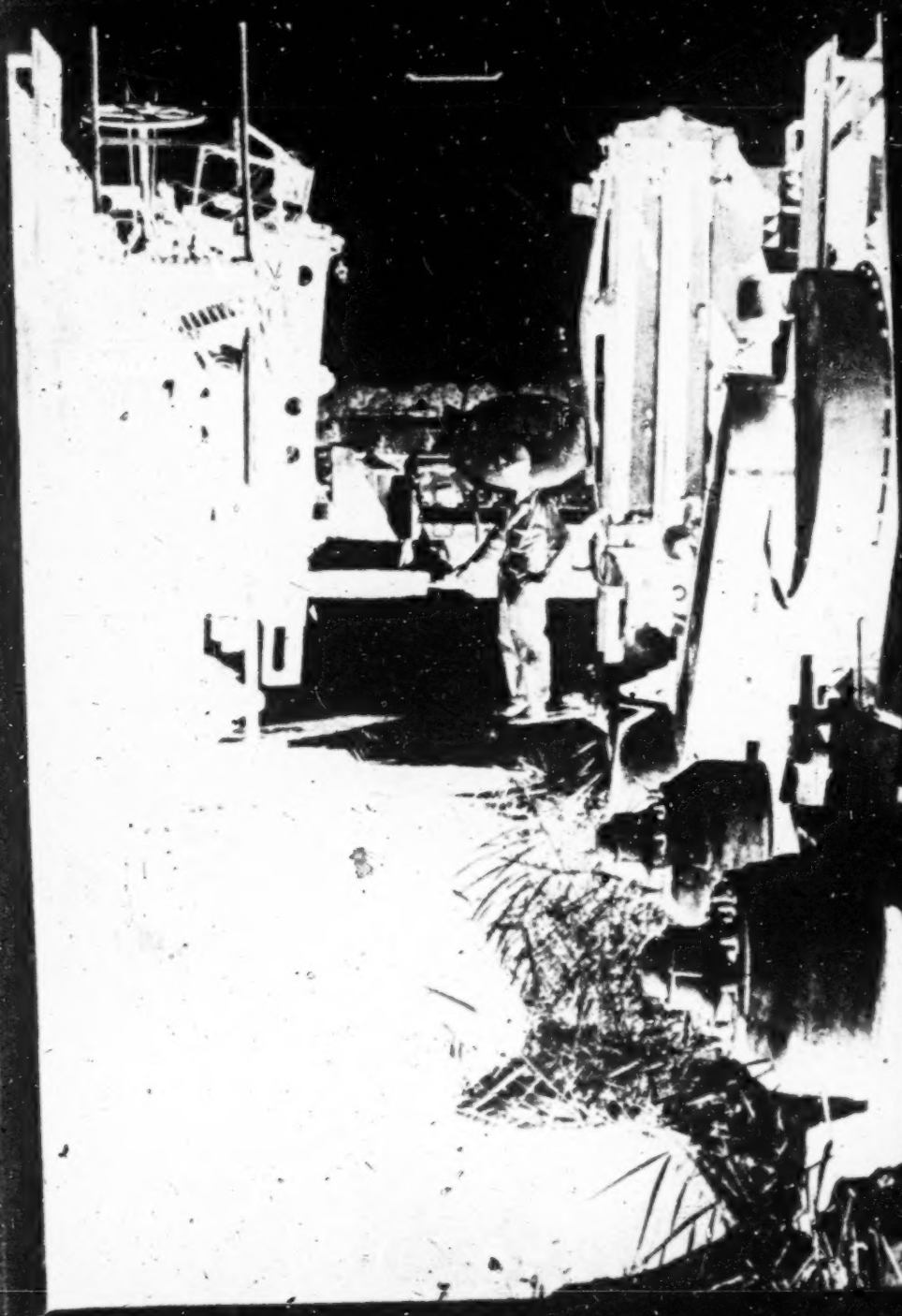
I certify that the 24th Article of War was read and thoroughly explained to the deponent by me prior to any questioning.

Signature R. M. Urdinarrain

Incl. No. 21

Scene where the Guard, Pvt. Thomas A. GUSIK, fi[illegible] thieves, inside of Depot 2L76.

MAR 5 1948



CONFIDENTIAL

CONFIDENTIAL

EXHIBIT "A"

CONFIDENTIAL

Classified ... authority ... MAR 3 ... By ... Edward W. Sa...

Scene of shooting and where the thieves broke into depot 2176 Ews
on 15 August 1947

Notice shoe belonging to one of the victim, MONTALBANO SALVATORE,
also Jack and Jack handle inside the Depot.

CONFIDENTIAL

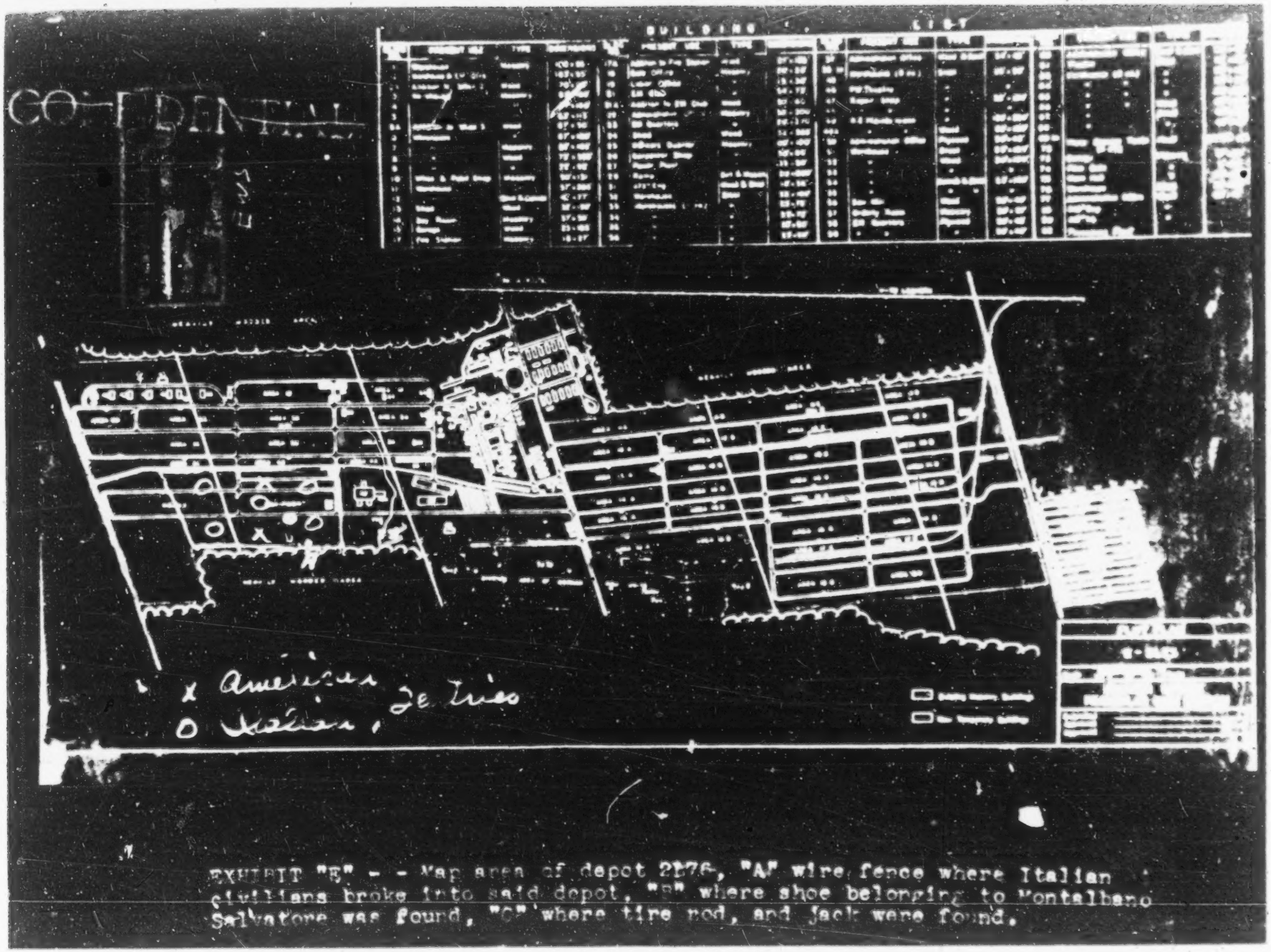


EXHIBIT "E" - - Map area of depot 2176, "A" wire fence where Italian civilians broke into said depot, "B" where shoe belonging to Montalbano Salvatore was found, "C" where tire rod, and jack were found.

Respondent's Exhibit "A".

HEADQUARTERS PORT OF LEGHORN
Office of the Port Judge Advocate
United States Army
APO 512

26 September 1947

MEMORANDUM: For the Commanding Officer, Port of Leghorn.

SUBJECT: Court-Martial Charges.

CASE OF: Gusik, Thomas A., RA 15 220 411, Private, 7156th Engineer Guard Company (Overhead).

I have examined these charges and files as required by paragraph 35 **b**, Manual for Courts-Martial, 1928.

1. They are now correct and complete in form.
2. They are appropriate to the evidence appearing in the record and a prima facie case justifying trial exists.
3. All specifications state offenses cognizable by courts-martial.
4. There is no reason appearing from the report of the medical officer, investigating officer, or otherwise, to believe that the accused was or may be now mentally defective or deranged, either temporarily or permanently.
5. Trial by general court-martial is recommended.

Tom H. Barratt
Lt. Col., JAGD
Port Judge Advocate

Inclosures:

1. Charge Sheet (Trip.)
2. Report of Investigating Officer (Trip.)
3. Certificate as to Previous Convictions (Trip.)
4. Correspondence attached.

Respondent's Exhibit "A".

HEADQUARTERS PORT OF LEGHORN
OFFICE OF THE PORT JUDGE ADVOCATE
APO 512, U. S. Army

21 October 1947

Accused's copy of record is forwarded herewith due to transfer to U. S. Disciplinary Barracks, Green Haven, New York before service of same could be made.

Vernon C. Rawls
Lt. Colonel, JAGD
Actg. Port Judge Advocate

CERTIFICATE

Under the provisions of Paragraph 2 i, AR 35-4120, 30 July 1943, compensation for clerical duties performed for a court will not be paid to a person who is in the pay of the Government. For this reason, the undersigned, who is a War Department employee, has not submitted a Reporter's Voucher for reporting the case of United States vs **Private Thomas A. Gusik, RA 15 220 411.**

Genevieve F. O'Leary
Reporter

12 Oct 47

HEADQUARTERS
PORT OF LEGHORN
Office of the Trial Judge Advocate
UNITED STATES ARMY
APO 512

10 October 1947

SUBJECT: Letter of Clemency

TO: Commanding Officer, Port of Leghorn, APO 512, U. S. Army (THRU: SJA)

Respondent's Exhibit "A".

We the members of the General Court, in the case of the United States vs. Thomas A. Gusik, though we feel that the evidence in the case supports the findings; unanimously recommend clemency for the following reasons:

a. The sentence was a mandatory sentence.

b. The past record of the accused being of a very good nature up until the time of the present offense.

c. The young age of the accused, he being eighteen (18) years of age.

d. The fact that accused was on guard duty, regularly posted at the time of the offense.

Virgil N. Cordero
Colonel, Infantry

Jerome F. Sears
Colonel, FD

Clyde W. Wellen
Lt. Col., Infantry

Merle A. Sherman
1st Lt., Infantry

Carlton Lowther
1st Lt., Infantry

Alex Von Plinsky, Jr.
1st Lt., CMP

HEADQUARTERS
PORT OF LEGHORN
Office of the Trial Judge Advocate
UNITED STATES ARMY
APO 512

10 October 1947

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To: Commanding Officer, Port of Leghorn, APO 512, U. S. Army (THRU: SJA)

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Respondent's Exhibit "A".

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b. The past record of the accused being of a very good nature up until the time of the present offense.

c. The young age of the accused, he being eighteen (18) years of age.

d. The fact the accused was on guard duty, regularly posted at the time of the offense.

Virgil N. Cordero
Colonel, Infantry

Jerome F. Sears
Colonel, FD

Clyde W. Wellen
Lt. Col., Infantry

Merle A. Sherman
1st Lt., Infantry

Carlton Lowther
1st Lt., Infantry

Alex Von Plinsky, Jr.
1st Lt., CMP

HEADQUARTERS
PORT OF LEGHORN
Office of the Trial Judge Advocate
UNITED STATES ARMY
APO 512

10 October 1947

SUBJECT: Letter of Clemency

To: Commanding Officer. Port of Leghorn, APO 512, U. S. Army (THRU: SJA)

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Respondent's Exhibit "A".

that the evidence in the case supports the findings; unanimously recommend clemency for the following reasons:

a. The sentence was a mandatory sentence.

b. The past record of the accused being of a very good nature up until the time of the present offense.

c. The young age of the accused, he being eighteen (18) years of age.

d. The fact the accused was on guard duty, regularly posted at the time of the offense.

Virgil N. Cordero
Colonel, Infantry

Jerome F. Sears
Colonel, FD

Clyde W. Wellen
Lt. Col., Infantry

Merle A. Sherman
1st Lt., Infantry

Carlton Lowther
1st Lt., Infantry

Alex Von Plinsky, Jr.
1st Lt., CMP

Classification
charged — cancelled
date—Mar. 5, 1948
By—Elwood W. Sargent

HEADQUARTERS
MEDITERRANEAN THEATER OF OPERATIONS
UNITED STATES ARMY
APO 512

22 October 1947

In reply refer to
AG 201-P-Gusik, Thomas A. (Enl)

Respondent's Exhibit "A".

SUBJECT: Transmittal of Record of Trial

TO: The Judge Advocate General
Department of the Army
Washington 25, D. C.

1. Forwarded herewith is record of trial by general court-martial in the case of Private Thomas A. Gusik, RA 15220411, for action under Article of War 50½.

2. Because the accused was transferred to US Disciplinary Barracks, Green Haven, New York, before his copy of the record could be served, the same is forwarded herewith.

FOR THE THEATER COMMANDER:
Robert O. Bender
CWO USA
Asst Adj General

1 Incl:
Record of Trial

RESTRICTED
HEADQUARTERS
PORT OF LEGHORN
UNITED STATES ARMY
APO 512

13 October 1947

REVIEW OF THE PORT JUDGE ADVOCATE

UNITED STATES vs. Private Thomas A. Gusik, RA 15220411, 7156th Engineer Guard Company (Overhead).

Age: 18 3/12 years
Date of Enlistment: 19 July 1946
Prior Service: None
Previous Convictions: None
Tried at: Leghorn, Italy

Respondent's Exhibit "A".

Date of Trial: 9 October 1947
Confinement: 3 September 1947
MTOUSA Disciplinary Training Center.
Sentence: DD, TF; CHL for life.
Maximum authorized: Death

CHARGES PLEAS FINDINGS

Charge Violation of the 92nd Article of War

Not Guilty Guilty

Specification 1: * * * Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

Not Guilty Guilty

Specification 2: * * * Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

Not Guilty Guilty

I. EVIDENCE

Prosecution:

During the afternoon of 12 August 1947, Private Parker, a tentmate of accused, told accused that an Italian named Franco and some other Italians were to come to his post, No. 2, that night between eleven and one o'clock (third relief) and he would send them over to accused's post. As a pre-arranged signal for identification whistling "Angelina" (R. 28, 30).

On 12 August 1947 between the hours of 1700 and 1900 the accused and Private First Class Hoagland, a member of the same company, were engaged in a conversation with two Italians near the Engineer Depot. Ac-

cused asked the Italians if they knew an Italian named Franco, to which they replied in the affirmative (R. 7). The accused then told them to tell Franco to come out to Post No. 4 at the Depot the next night where accused would be on the second relief from 0300 to 0500. Franco was to come out whistling "Angelina" and accused would whistle another verse of "Angelina" which would be the signal for them to come in to get tires (R.8). Later on the way back to camp after leaving the Italians accused said to Hoagland he was going to get Franco because Franco had screwed him out of a wrist watch (R. 8).

The following night, 13 August 1947, at about 0300 hours accused was a sentinel on Post No. 4 at the Engineer Depot near Tirrenia, Italy, which is a walking post along the fence (Pros. Ex. No. 2). Across from this fence is a wooded area where the Italian Franco, who had done business before with accused, had his gang consisting of Teodoro Moro, Marcello, Ciro, Alvaro and Luigi (brother of Franco) (R. 10, 18). They had gathered here to steal tires from the Depot as had been pre-arranged between accused and Franco (R. 9). The pre-arranged signal was given by Franco and accused returned the agreed signal by whistling "Angelina"; Franco then went over and talked with sentry (accused) for about three or five minutes after which he called to the gang to come over to the fence.

The sentry started to walk towards Post No. 5, when the gang got up to the fence and accused said to the Italians to cut a hole in the fence and enter (R. 11, 20). Marcello cut the hole with pliers then entered (R. 11, 19); Luigi and Alvaro remained outside with the rest of the gang. The accused continued to walk towards Post No. 5 and about three or four seconds after Marcello went through the hole in the fence the accused started shooting (R. 11). Accused shot about 15 or 20 shots, then the sentinel on Post No. 5 came running up and started to shoot, firing about 30 rounds towards the woods over the fence; accused was firing towards the fence (R.

32, 34). After the firing stopped two Italians' bodies were found by the corporal of the guard who had been called. The bodies were identified as Moro and Montalbano, members of the Franco gang (Uros. Ex. No. 3 and 4). The Italian doctor who performed the autopsy on August 13 and 14 identified the bodies and testified that the men died from gun shot wounds. There was no warning of any kind given before the shooting started (R. 12, 19, 32).

Accused admitted to Lieutenant Birmingham, the Officer of the Day, that he fired the shots (R. 26). Without objection by the defense the court admitted in evidence a pre-trial, sworn statement of accused (Pros. Ex. No. 5). The statement follows:

"I arrived in the Port of Leghorn on 26 December 1946. I was then sent to the 149th Replacement Depot, later on on 28th December 1946 I was transferred to the 88th Division to the 913th Field Artillery, I then left the 88th Division on March 7th 1947. I was then stationed on Depot 2L76, with the 93th F.A., later I became the 7156 Engr. Guard Company. While I was with the 7156th, I came to know a certain FRANCO. I got to know him sometime in May 1947; the way I got to know this FRANCO was on May 1947, when he first approached me, and asked me if I wanted to sell any gas or tires. Then, in the month of June 1947, I made my first deal, with FRANCO, I told FRANCO what post I was going to be on, and at what time to come in. I do not recall the date and time, only that it was the early morning hours. I let FRANCO and two Italians named DI PINTO LUIGI, and MARCELLO get into the Depot. On this deal, the three Italians did not steal anything, due that they had not brought any tool with them, because they intended to take tires out. After this, FRANCO would approach me, but I did not make any deal with him, because I did not know what post I would be on. Then on the 11th of August 1947, I knew what Post I was going to be on. I then got a pass and went out

to look for FRANCO, to tell him to bring his gang, so that the deal could be pulled. Instead I met MORO who I knew was one of FRANCO'S men, I told MORO to tell FRANCO that I would be on Post No. 4 from 0300 hours to 0500 hours, 13th August 1947. MORO then told me that he would see FRANCO and tell him. I also told MORO to tell FRANCO to whistle the tune of Angelina; The tune Angelina was used in both deals, I was involved. I was shown a statement given by WILLIAM E. HOAGLAND, by Agent URDINARRAIN, dated 4 September 1947, on one page and sworn to, on the 12th of August 1947, and confirmed the same on every detail, except the part where I said I'll get FRANCO. I have identified the photograph shown to me by Agent URDINARRAIN, as one of the two men I had spoken to as was mentioned in HOAGLAND statement. One of these two men, I later shot on 13th August 1947. I have seen this same man with FRANCO, when he approached me. Pvt. PARKER told me before going on guard the next day, that he also had made a deal with FRANCO. On 13th August 1947, I went on duty at 0300 hours, on Post No. 4. As soon as I got on my Post, I started to whistle "Angelina". While whistling (Angelina), I kept walking along the fence line, waiting for FRANCO to whistle (Angelina) so that I could give him the OK to come inside of the Depot. About half an hour later, I heard someone whistling (Angelina). I knew it was FRANCO and his gang. A few minutes later, FRANCO came out to the fence. FRANCO then told me "Where can I let them in?". I replied that he could not come in, because the O.D., Lt. BIRMINGHAM, was checking the area. FRANCO was mad because I had made a deal with him and then I did not want to go through with the deal. FRANCO then walked off into the woods. I then started to go towards Post No. 5, when someone fired upon me. I crawled under the stone crusher. I stayed under the stone crusher for a while, then I got behind the stone crusher, then I got up and walked towards Post No. 5,

where ZAHURONES was. On my way to ZAHURONES, I heard someone by the fence, it sounded like someone was cutting the wire fence. I then saw some civilians enter the area. I shouted "Halt" but no one stopped. I then halted the civilians the second time. This time, the civilians started to go through the fence. I then fired at the civilians. I fired between ten to fifteen rounds, in my first burst, being that my gun had jamed (Cal. 30 Carbine T-4 No. 000571). On my second burst I fired about fifteen rounds. I then fired an other clip, in order to get the Cpl. of the Guard to come to my Post, I fired three clips in all. The Cpl. of the Guard arrived (Cpl. SOPKO). The Cpl. and myself went outside of the fence, and brought in the two wounded Italians. After we had brought the two wounded Italians, I recognibed one of the Italians to be the same man in the Photography shown to me in the C.I.D. Office. Later, the ambulance arrived and the two Italians were taken to the Hospital. I am positive that the shots fired from my gun killed the two Italians, because I was the closer one to them, and the first one to fire. Even though I had dealt with this group, headed by FRANCO, the reason I shot the two men was because they did not halt; the reason why I shot them was because they did not stop after I had hollered halt twice. The halt business came after I had spoken to them the first time. I knew that PARKER was involved in about three or four deals, or more, because he told me so. I do not remember the exact details, I know that he was involved with many other members of the guard details. I do not remember the names."

Defense:

After being duly informed of his rights accused elected to remain silent and offered no evidence in his behalf.

II. COMMENT

The evidence is sufficient to sustain the findings and sentence.

Accused was charged with the murder of Salvatore Montalbano and Teodoro Moro, Italian civilians, on or about 13 August 1947, at or near Tirrenia, Italy. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse (MCM, 1928, Page 162). "Malice aforethought" does not necessarily mean hatred or personal ill will toward the person killed, nor an actual intent to take his life, nor even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it existed at the time the act was committed (Clark).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused; An intention to cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not (except when death is inflicted in the heat of passion caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person whether such person actually is killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; intent to commit any felony (MCM, 1928, Pages 163, 164).

The evidence clearly established that accused killed both Salvatore Montalbano and Teodoro Moro by shooting them with his carbine without any warning. The accused had prearranged to have these Italians come to his post to steal tires. Accused had threatened to get the

leader of the gang, Franco, because he had cheated him on some previous deal. All the eye witnesses testified that no command to halt had been given or any warning shots fired. There was no evidence that accused was in any danger from the time he signalled the Italians and told them to cut the fence and enter up to the time he began to shoot. Accused in his sworn pre-trial statement admits it was his gun that shot both deceased. In this statement he claims he was fired upon by the Italians but all the witnesses before the court fail to substantiate this claim.

The court chose not to believe that part of the pre-trial statement giving accused's version of self defense and found him guilty sentencing him to confinement for life but recommended clemency.

The accused is 18 3/12 years of age, enlisted in the Regular Army 19 July 1946 at Cleveland, Ohio to serve for one and one half years, coming overseas 2 December 1946. There was no evidence of any previous convictions. The age of the accused may be considered as a mitigating circumstance, but it is not advised that such be considered by the reviewing authority in view of the fact that a finding of guilty of murder carries a mandatory sentence to death or life imprisonment.

The court was legally constituted and had jurisidction of the accused and of the offense charged. The record of trial is legally sufficient and there were no errors or irregularities which injuriously affect any of the substantial rights of the accused or invalidate the findings or sentence in whole or in part.

III. RECOMMENDATION

It is recommended that the sentence be approved and the record of trial be forwarded for action under Article of War 50½. A form of action designed to carry into effect the foregoing recommendation is attached.

TOM H. BARRATT
Lt. Col., JAGD
Port Judge Advocate

Respondent's Exhibit "A".

HEADQUARTERS
MEDITERRANEAN THEATER OF OPERATIONS
UNITED STATES ARMY
APO 512

ROB/lc

22 October 1947

In reply refer to
AG 201-P-Gusik, Thomas A. (Enl)

SUBJECT: Transmittal of Record of Trial

TO: The Judge Advocate General
Department of the Army
Washington 25, D. C.

1. Forwarded herewith is record of trial by general court-martial in the case of Private Thomas A. Gusik, RA 15220411, for action under Article of War 50½.

2. Because the accused was transferred to US Disciplinary Barracks, Green Haven, New York, before his copy of the record could be served, the same is forwarded herewith.

FOR THE THEATER COMMANDER:

Robert O. Bender
CWO USA
Asst Adj General

1 Incl:
Record of Trial

A CHRONOLOGY OF THE CASE OF:

Private Thomas A. Gusik, RA 15 220 411,
7156 Engineer Guard Company (Overhead)

	Date	No. of days	Explanation
1. Offense Committed:	13 Aug 47		

Respondent's Exhibit "A".

2.	Accused confined by military authority ordering trial:	3 Sep 47	0
3.	Charges preferred: (Date of jurat)	18 Sep 47	15
4.	Charges investigated: (Date of report)	18 Sep 47	15
5.	Charges forwarded by Co:	.....	..
6.	Charges received by JA:	25 Sep 47	22
7.	Charges returned:	.....	..
8.	Charges received back:	.....	..
9.	Charges-Action JA	26 Sep 47	23
10.	Charges referred for trial:	26 Sep 47	23
11.	Trial had:		
	Total days to trial:	9 Oct 47	36
	Less time in hospital	.....	..
	Less delay at request of defense	.....	..
	Net Total:		36
12.	Record of Trial received:	13 Oct 47	40
13.	Review by Staff JA	13 Oct 47	40
14.	Action by Reviewing Authority:	13 Oct 47	40
	Total to Action by Reviewing Authority:		40
15.	Mimeo. Orders received:	.....	..
16.	Record of Trial mailed to J.A.G.O.:	21 Oct 47	40
	TOTAL		40

Remarks:

Vernon C. Rawls
Lt. Colonel, JAGD
Actg. Port Judge Advocate

GENERAL COURT-MARTIAL DATA SHEET

Cusik, Thomas A., RA 15 220 411, Private, 7156th Engineer Guard Company (Overhead)
(Last name) (First name) (Middle initial) (Army serial No.) (Grade) (Company, regiment, or arm or service)

J. A. G. O., C. M. No.

	Trial J. A.		Staff J. A.		J. A. G. O.	
	Yes	No	Yes	No	Yes	No
1. Was court ordered by proper authority?	✓		✓		✓	
2. Are all orders showing membership of court properly entered in record?	✓		✓		✓	
3. Were there less than five members detailed or present at any meeting?		✓		✓		✓
4. Was the law member of the court designated by convening order?	✓		✓		✓	
5. If the presence of the law member was specifically required by the convening authority, was he present at each session?	✓		—		—	
6. Did the court have jurisdiction of person and offense?	✓		✓		✓	
7. Does the record show place, date, and hour court convened?	✓		✓		✓	
8. Are all members of the court, trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel accounted for as present or absent?	✓		✓		✓	
9. Was accused asked whom he desired as counsel?	✓		✓		✓	
10. Was reporter sworn?	✓		✓		✓	
11. Was interpreter sworn?	✓		✓		✓	
12. Was accused extended right of challenge as to each member of the court, and was he instructed as to his right to exercise one peremptory challenge against any member except the law member?	✓		✓		✓	
13. Was action of court upon challenges regular and properly taken?	—		—		—	
14. Was the court sworn?	✓		✓		✓	
15. Was any officer sitting as a member of the court the accuser, a witness for the prosecution, or, upon a rehearing, one who sat as a member on the former trial?		✓		✓		✓
16. Was the personnel for the prosecution sworn?	✓		✓		✓	
17. Was the accused properly arraigned?	—		✓		✓	
18. If pleas of guilty were explained was accused's response, if any, recorded?	—		—		—	
19. Does each specification state an offense under the Articles of War?	—		✓		✓	
20. Are there copied into the record—						
(a) Charges and specifications?	✓		✓		✓	
(b) Name, grade, and organization of the person signing charges?	✓		✓		✓	
(c) Affidavit to the charges and specifications?	✓		✓		✓	
(d) Name of the person who administered the oath verifying the charges, and his official capacity?	✓		✓		✓	
(e) The order of reference for trial?	✓		✓		✓	
21. If the accused was advised of his right to plead the statute of limitations, was his response, if any, recorded?	—		—		—	
22. Are pleas of accused regularly entered?	✓		✓		✓	
23. Were the witnesses sworn?	✓		✓		✓	
24. Are the findings properly entered?	✓		✓		✓	
25. Was the vote upon each finding by secret written ballot?	✓		✓		✓	
26. Was sentence reached by secret written ballot?	✓		✓		✓	
27. Did at least two-thirds of members present at the time the vote on each finding was taken concur therein?	✓		✓		✓	

W. D., A. G. O. Form No. 116
April 2, 1928

(OVER)

10—13042-1

	Trial J. A.		Staff J. A.		J. A. G. O.	
	Yes	No	Yes	No	Yes	No
28. In each case of finding of guilty where death sentence was mandatory, did all members present concur in each finding?						
29. Did members present concur in sentence, as follows: To death, all members; to life imprisonment or confinement for over ten years, at least three-fourths of members; to any other punishment, at least two-thirds?	✓		✓		✓	
30. Does the evidence sustain the findings of the court?			✓		✓	
31. Are the findings legal?	✓		✓		✓	
32. Is the sentence legal?	✓		✓		✓	
33. Does any ruling of the court on the admission of evidence or other matters injuriously affect the substantial rights of accused?				✓		✓
34. Did all members who participated in proceedings in revision vote on original findings and sentence?						
35. At proceedings in revision are the trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, the accused, and the individual counsel, if any, accounted for as present or absent?						
36. Is the record properly authenticated?			✓		✓	
37. Is action of reviewing authority properly entered in record and signed?			✓		✓	
38. In case of adjournment or continuance, are each day's proceedings properly signed by trial judge advocate?						
39. After each adjournment during trial, is presence or absence of members of court, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, accused, his individual counsel, and the reporter properly accounted for?	✓					
40. Is the action of the reviewing authority legal and properly taken?					✓	
41. Is clemency recommended?	✓		✓ (all)		✓	

Trial Judge Advocate. 13 Oct 1947 Date

VERNON C. RAWLS
Lt. Colonel, JAGD
Acting Judge Advocate. 13 Oct '47 (Date)

Officer Reviewing Record. Action: LS 16 Jan 1948 (Date)

Bd of Review No 2

Chief Examiner. (Action) (Date)

NOTE.—Questions 13, 17, 18, 19, 21, 30, 33, 37, and 40 not to be answered by the trial judge advocate. Question 40 not to be answered by the staff judge advocate.

U. S. GOVERNMENT PRINTING OFFICE

CHARGE SHEET

Leghorn, Italy; 1[illegible] September 1947

Name, etc., of accused: Gusik, Thomas A., RA 15 220 411, Private, [illegible]th Engineer Guard Company (Overhead).

(Present) Class "E" $25.00

Age 18 3/12 Pay $ 90.00

Government Insurance deduction, $ 6.40

Data as to service: No Prior Service: Enlisted in Regular Army on 19 July 1946 at Cleveland, Ohio to serve for one and a half years. Overseas 2 December 1946. Authorized to wear: Glider Badge, Occupation Medal for Italy.

Data as to witnesses, etc.: AGAINST THE ACCUSED:

John S. Strano, CID Agent, Leghorn, Italy.
1st Lt. Paul A. Blakenship, 7156th Engineer Guard Company (Overhead)
R. M. Udinarrian, CID Agent, Leghorn, Italy.
S/Sgt. Laurier Gagnon, 7156th Engineer Guard Company (Overhead).
Sgt. Andrew F. Sopko, 7156th Engineer Guard Company (Overhead)
Pfc. George Mattheus, 1170th Engineer Headquarters & Service Company.
Pfc. William E. Hoagland, 7156th Engineer Guard Company (Overhead)
Pfc. Frank Zahurones, 7156th Engineer Guard Company (Overhead)
Pvt. Ural B. Parker, 7156th Engineer Guard Company (Overhead).
Di Pinto Luigi, Via Stazza # 10, Bagnoli (Naples), Italy.
Alessandri Alvaro, via Arnino, Marina di Pisa, Italy.
Colombini Adolfo, 14th MP Co., 6th Group Bn., 2 L 76.
Cellauro Angelo, 14th MP Co., 6th Group Bn., 2 L 76.
Vitetta Antonio, 14th MP Co., 6th Group Bn., 2 L 76.
Del Monte Zelmira, Via S. Maria # 23, Pisa, Italy.
Prof. Ideale del Carpio, University or Pisa, Pisa, Italy.

FOR THE ACCUSED:
NONE

DOCUMENTARY EVIDENCE:
Sworn statement or accused dated 15 September 1947.
Guard Roster for 12 August 1947.
Depot Sentry Orders dated 20 July 1947
Photographs of victims
Diagram of Area
Autopsy reports dated 14 August 1947 of Medical Department, University of Pisa.

Data as to restraint of accused: Confined at MTOUSA Disciplinary Training Center on 3 September 1947.
(Give date, place, and initial date of any restraint of accused)

D. A. G. O. Form No. 115
(July), 1943

Respondent's Exhibit "A".

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

Specification 2: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

(Signature of accuser) Benjamin Axleroad
Major, JAGD, JA Section,
Port of Leghorn.

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 18th day of September, 1947, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* ..... *has investigated the matters set forth in specifications 1 & 2 of the Charge and the Charge, and that the same are true in fact, to the best of his knowledge and belief.

(Signature) Percy A. Matthews
Major, JAGD, JA Section,
Port of Leghorn.

NOTES—At (*) strike out words not applicable.

Respondent's Exhibit "A".

If the accuser has personal knowledge of the facts stated in one or more specifications or parts thereof, and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the oath will be varied accordingly. In no case will he be permitted to state alternatively, as to any particular charge or specification, that he either has personal knowledge or has investigated. If the oath is administered by a civil officer having a seal, his official seal should be affixed.

1st IND.

Headquarters Port of Leghorn, APO 512, U. S. Army.

26 September, 1947

Referred for trial to Captain Donald S. Young, QMC, Trial Judge Advocate, general court-martial appointed by paragraph 1, Special Orders No. 38, Headquarters Port of Leghorn, 3 September, 1947.

By Order of Colonel Orsinger:

William V. Cornett
1st Lt., JAGD,
Asst. Adj Gen.

I have served a copy hereof on (~~accused~~) the above-named accused, this 26th day of September, 19 47

(Signature) Fred L. Allen, Trial Judge Advocate.
FRED L. ALLEN
Capt., Inf., Hq MTOUSA
(Grade and organization)

(SPACE FOR USE WHERE TRIAL IS BY SUMMARY COURT)

CASE No.

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR ACQUITTAL AND REMARKS

Place ....., Date ....., 19....

(Signature, grade and organization) Summary Court.

Headquarters (Place and date) ....., 19....

(Action of reviewing authority)

(Signature, grade, and organization), Commanding.

Entered on service record in cases of conviction (Initials of personnel adjutant)

(WRITE NOTHING BELOW THIS LINE) 16-27768-2

RECORD OF TRIAL

(Proper)

of

Gusik	Thomas A.	RA 15 220 411
(Last name)	(First name and middle initial)	(Army serial No.)

Private — (Grade)

7156th Engineer Guard Company (Overhead) — (Organization)

APO 782, U. S. Army — (Station)

By

GENERAL COURT MARTIAL

Appointed by the Commanding Officer

PORT OF LEGHORN

Tried at

Leghorn, Italy 9 October 1947

Index	Page
Arraignment	4
Pleas	5
Statement by accused	None
Findings	39
Sentence (or acquittal)	39
Proceedings in revision	

TESTIMONY

Name of Witness	Direct	Cross	Redirect	Recross	Court	Recalled
	Page	Page	Page	Page	Page	Page
Pfc William A. Hoagland	7	8				
Di Pinto Luigi	9	12	15	16	14,15	
Alessandri Alvaro	16	21	22	22	21	
1st Lt Walter P. Birmingham	22	24		25	24,25,26	
Ideale Del Carpio	26	27				
Pvt Ursl B. Parker	27					
Pfc Frank Aahurones	30	32	36	34,37	33,36,37	
Agt Robert M. Urdinarrian	37					

EXHIBITS, ETC., APPENDED

Description	Number	Page where introduced
Special Orders for Guards at Engineer Depot	1	6
True Copy of Guard Roster 12 Aug 47	2	6
Photograph of Salvatore Portalbano	3	23
Photograph of Teodoro Moro	4	27
Statement of Accused	5	38

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a carbon copy of the above described record of trial, delivered to me at

this ..... day of 19

(Signature of accused)

Respondent's Exhibit "A".

HEADQUARTERS PORT OF LEGHORN
OFFICE OF THE PORT JUDGE ADVOCATE
APO 512, U. S. ARMY

21 October 1947

Accused's copy of record is forwarded herewith due to transfer to U. S. Disciplinary Barracks, Green Haven, New York before service of same could be made.

Vernon C. Rawls
Lt. Colonel, JAGD
Actg. Port Judge Advocate

PROCEEDINGS OF A GENERAL COURT MARTIAL

which convened at Leghorn, Italy, pursuant to the following order. . . . :

HEADQUARTERS
PORT OF LEGHORN
UNITED STATES ARMY
APO 512

6 October 1947

SPECIAL ORDERS)

Number 50)

6. A general court-martial is appointed to meet at this headquarters, at 0900 hours, 7 October 1947, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

COLONEL VIRGIL N. CORDERO, 0-7472, INF, Law Member,
COLONEL JEROME F. SEARS, 0-100021, FD,
LT COLONEL CLYDE W. WELLEN, 0-153627, INF,

Respondent's Exhibit "A".

MAJOR JAMES WATSON, 0-482200, CML C,
CAPTAIN GERALD A. HARTY, 0-1634861, INF,
1ST LIEUTENANT MERLE A. SHERMAN, 0-1320484, INF,
1ST LIEUTENANT CARLTON LOWTHER, 0-551674, INF,
1ST LIEUTENANT ALEX VON PLINSKY, JR, 0-41241, CMP,
CAPTAIN DONALD C. YOUNG, 0-1588391, QMC,
Trial Judge Advocate
CAPTAIN FRED L. ALLEN, 0-303893, INF,
Assistant Trial Judge Advocate
CAPTAIN DEWEY KLEMM, 0-496809, CMP,
Assistant Trial Judge Advocate
1ST LIEUTENANT CLARENCE W. BURKS, 0-2039431, INF,
Defense Counsel
CAPTAIN JOSEPH M. O'LEARY, 0-1168013, FA,
Assistant Defense Counsel.

All unarraigned cases in the hands of the Trial Judge Advocate of The General Court-Martial appointed by paragraph 1, Special Orders Number 38, this headquarters, dated 3 September 1947, may be brought to trial before this court.

BY ORDER OF COLONEL ORSINGER:

Ralph C. Tilley
Colonel, AGD
Adjutant General

OFFICIAL:
Ralph C. Tilley
Colonel, AGD
Adjutant General

DISTRIBUTION:

1	TAG (Compilation)	1	CO Ea Orgn Concerned
2	CO, Port of Leghorn	2	AG Opns
2	CG, MTOUSA	2	G-1
100	JA, Port of Leghorn		

Respondent's Exhibit "A".

25	AG Library	1	G-3
10	TJA,GCM	14	File
1	EA Officer	2	AG AT&O
2	AG Records		

RESTRICTED

Leghorn, Italy
9 October, 1947

ORGANIZATION OF THE COURT

The court met pursuant to the foregoing order at 1:45 o'clock P.M.

PRESENT

COLONEL VIRGIL N. CORDERO, 0-7472, INF—Law Member

COLONEL JEROME F. SEARS, 0-100021, FD

LT COLONEL CLYDE W. WELLEN, 0-153627, INF

1ST LIEUTENANT MERLE A. SHERMAN, 0-1320484, INF

1ST LIEUTENANT CARLTON LOWTHER, 0-551674, INF

1ST LIEUTENANT ALEX VON PLINSKY, JR, 0-41241, CMP

CAPTAIN DONALD C. YOUNG, 0-1588391, QMC—Trial Judge Advocate

CAPTAIN FRED L. ALLEN, 0-303893, INF—Assistant Trial Judge Advocate

1ST LIEUTENANT CLARENCE W. BURKS, 0-2039431, INF — Defense Counsel

ABSENT

Excused—on official leave:

MAJOR JAMES WATSON, 0-482200, CML C

Excused—on official business:

CAPTAIN DEWEL KLEMM, 0-496809, CMP — Assistant Trial Judge Advocate

Respondent's Exhibit "A".

CAPTAIN JOSEPH M. O'LEARY, 0-1168013, FA — Assistant Defense Counsel

Returned to Zone of Interior:

CAPTAIN GERALD A. HARTY, 0-1634861, INF

The court proceeded to the trial of Private Thomas A. Gusik, RA 15 220 411, 7156th Engineer Guard Company (Overhead) who, on appearing before the court, was asked by the trial judge advocate whom he desired to introduce as counsel.

RESTRICTED

Record of trial GCM.

See appendix 6, MCM.

Page 2

The accused stated he desired to be defended by the regularly appointed defense counsel.

Genevieve F. O'Leary was sworn as reporter.

PROSECUTION TO ACCUSED: Do you want a copy of the record of trial?

ACCUSED: Yes, sir.

Lola Giusti was sworn as interpreter.

The trial judge advocate then announced the names of the members of the court present and absent.

The trial judge advocate then announced the names of the accuser, the investigating officer, officers who forwarded the charges and any members of the court who would be called as witnesses for the prosecution as follows:

The charges were preferred by Benjamin Axleroad, Major, JAGD, investigated by William A. Calfee, 1st Lt., Infantry, sworn to before Percy A. Matthews, Major, JAGD, and referred to the trial judge advocate by order of Colonel Remington Orsinger, who recommended trial.

PROSECUTION: If any member of the court is aware of any facts which he believes to be a ground of

challenge by either side against any member, it is requested he state such facts.

PRESIDENT: Apparently none.

PROSECUTION: The prosecution has no challenges, either for cause or peremptorily.

PROSECUTION TO ACCUSED: You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.

DEFENSE: The accused has no challenges either for cause or peremptorily.

The accused was then asked if he objected to any other member present, to which he replied in the negative.

RESTRICTED

Record of trial GCM,

See appendix 6 and AW 19 (p. 207), MCM, Page 3.

The members of the court and the personnel of the prosecution were then sworn.

ARRAIGNMENT

The accused was then arraigned upon the following charges and specifications:

CHARGE: Violation of the 92nd Article of War.

SPECIFICATION 1: In that, In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13 August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Salvatore Montalbano, a human being, by shooting him with a carbine.

SPECIFICATION 2: In that Private Thomas A. Gusik, 7156th Engineer Guard Company (Overhead), did, at or near Tirrenia, Italy, on or about 13

Respondent's Exhibit "A".

August 1947, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Teodoro Moro, a human being, by shooting him with a carbine.

Record of trial GCM.
See appendix 6 and AW 19 (p. 207), MCM. Page 4.

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s/ Benjamin Axleroad
(Signature of accuser (typed))
BENJAMIN AXLEROAD
(Name (typed))
Major, JAGD, JA Section,
(Grade, organization, or arm of service)
Port of Leghorn

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser, this 18th day of September, 1947, and made oath that he is a person subject to military law and that he personally signed the foregoing charges and specifications, and further that he* . . . . . *has investigated the matters set forth in specifications 1 and 2 of the Charge and the Charge, and that the same are true in fact, to the best of his knowledge and belief.

s/ Percy A. Matthews
(Signature (typed))
PERCY A. MATTHEWS
(Name (typed))
Major, JAGD, JA Section
(Grade and organization)
Port of Leghorn

Respondent's Exhibit "A".

(Official character, as summary court, notary public, etc.)

1st IND.

26 September, 1947

Headquarters Port of Leghorn, APO 512, U. S. Army.

Referred for trial to Captain Donald C. Young, QMC, Trial Judge Advocate of general court-martial appointed by paragraph 1, Special Orders No. 38, Headquarters Port of Leghorn, 3 September, 1947.

By ORDER OF COLONEL ORSINGER:

s/ William V. Cornett

WILLIAM V. CORNETT,
1st Lt., JAGD
Asst. Adj. Gen.

The accused then pleaded as follows:
To Specification 1 of the Charge Not Guilty
To Specification 2 of the Charge: Not Guilty
To the Charge: Not Guilty.

The charge and specifications were served on the accused on 26 September 1947 by the assistant trial judge advocate.

Neither the court nor the defense desired any parts of the Manual or other legal publications read.

The trial judge advocate did not desire to make an opening statement to the court.

TESTIMONY FOR THE PROSECUTION

Prosecution: The prosecution will stipulate and will the accused and counsel for the accused stipulate that the 1170th Engineer General Service Regiment is on duty at Engineer Depot E2L76 at Tirrenia, Italy.

Defense: The accused and counsel for the accused will enter into that stipulation.

Respondent's Exhibit "A".

Law Member: The court will accept the stipulation.

Prosecution: The Prosecution will stipulate and will the accused and counsel for the accused stipulate that Prosecution's Exhibit 1 for identification is the Special Orders for the guards of the Engineer Deport on the date in question of this trial.

Defense: The accused and counsel for the accused will enter into that stipulation.

Law Member: The court will accept the stipulation.

Prosecution: The prosecution offers into evidence Prosecution's Exhibit 1 for identification, a true extract copy of Special Orders for the guards.

Defense: No objection.

Law Member: It will be accepted into evidence and marked Prosecution's Exhibit 1.

Prosecution: The prosecution will stipulate and will counsel for the accused and the accused stipulate that Prosecution's Exhibit 2 for identification is a true copy of the guard roster for the 12th day of August 1947.

Defense: The accused and counsel for the accused will so stipulate.

Law Member: The court will accept the stipulation.

Prosecution: The prosecution offers into evidence Prosecution's Exhibit 2 for identification.

Defense: No objection.

Law Member: It will be accepted into evidence and marked Prosecution's Exhibit 2.

Prosecution: The prosecution will stipulate and will the accused and counsel for the accused stipulate that the accused Gusik was on the second relief of this guard and posted on Post No. 4 at approximately 0300 on the morning of 13 August 1947?

Defense: The accused and counsel for the accused will enter into that stipulation.

Law Member: The stipulation will be accepted by the court.

Private First Class William E. Hoagland, a witness for the prosecution was sworn and testified as follows:

Respondent's Exhibit "A".

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. William E. Hoagland.
Q. You are a member of the Military service of the United States with the grade of private first class?
A. Yes, sir.
Q. To what organization are you assigned?
A. 7156th Engineer Guard Company (Overhead).
Q. Located at Tirrenia, Italy?
A. Yes, sir.
Q. Do you know the accused?
A. Yes, sir.
Q. Is he present in court today?
A. Yes, sir.
Q. Will you point him out?
A. Yes, sir (indicating accused).
Q. Directing your attention to the 12th day of August 1947, did you see the accused Gusik?
A. Yes, sir.
Q. Where?
A. I went out on a pass with him.
Q. Where did you go?
A. To a hotel at Tirrenia.
Q. What time did you go on pass?
A. About seven o'clock.
Q. In the evening?
A. Yes, sir.
Q. What time did you return to camp?
A. About nine o'clock.
Q. In the evening?
A. Yes, sir.
Q. Were you with Gusik during all that period of time between seven and nine o'clock?
A. Yes, sir.
Q. Did the accused Gusik during that two-hour period of 12 August 1947 have any conversation with any Italians?

A. Yes, sir.
Q. Where?
A. About 300 yards from the hotel.
Q. Who was present besides you and Gusik?
A. Two Italians.
Q. Will you relate to the court the conversation he had with the two Italians at that time?
A. He asked them if they knew another Italian named Franco. They said, "Yes." He told them to tell Franco to come out to his post No. 4 which he would be on the next night on the second relief. He told them to tell Franco to come out and whistle "Angelina" and in turn he would whistle another verse of "Angelina" and for them to come in.
Q. For what purpose were they to come in?
A. To get tires, I guess.
Q. After that conversation with the Italians you remained in the presence of the accused Gusik, is that true?
A. Yes, sir.
Q. Did you have any further conversation with the accused Gusik?
A. When coming back to camp.
Q. Just you and Gusik alone?
A. Yes, sir.
Q. What did Gusik tell you as you were coming back to camp?
A. He told me he was going to get Franco because Franco had screwed him out of a wrist watch.
Q. Did he say how he was going to get Franco?
A. No, sir.

Prosecution: You may have the witness.

CROSS EXAMINATION

Questions by Defense:

Q. Where is this hotel located?
A. Just on the other side of our camp.

Respondent's Exhibit "A".

Q. Near the camp?
A. Yes, sir.
Q. In Tirrenia, Italy?
A. Yes, sir.
Q. Did you go right back to your camp after he had the conversation with the Italians?
A. Yes, sir.
Q. What day did this conversation take place?
A. I can't tell you just what day it was.
Q. Didn't you just testify it was the 12th of August?
A. Yes, sir.
Q. Were you on guard with Gusik?
A. No, sir.
Q. Do you do guard duty at the depot?
A. Yes, sir.
Q. What time is the guard mount?
A. At one o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. You were with the accused since 1900 hours on 12 August 1947?
A. Yes, sir.
Q. That is when you had the conversation?
A. Yes, sir.
Q. Was there anything said in the conversation as to why these men were going in the depot?
A. No, sir.
Q. Then you don't know why they were going in the depot?
A. No, sir.
Defense: No further questions.

Di pinto Luigi, a witness for the prosecution, through the interpreter, was sworn and testified as follows:

Respondent's Exhibit "A".

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Di Pinto Luigi.
Q. Where do you live?
A. Bagnoli.
Q. That is near Naples, Italy?
A. Yes, sir.
Q. When did you come from Naples to the Leghorn area?
A. 29 July.
Q. Of this year?
A. Yes.
Q. Do you know an Italian by the name of Franco?
A. It is my brother.
Q. Where is he now?
A. I don't know.
Q. When did you last see him?
A. When they caught me — I haven't seen him since.
Q. That was on 13 August?
A. Yes.
Q. Where did they catch you?
A. At Marina di Pisa in Alvaro's house.
Q. Directing your attention to the night of 12 August 1947 and the early morning of 13 August 1947, did you have occasion to go to the Engineer Depot at Tirrenia, Italy?
A. I?
Q. Yes, You.
A. Would you explain to me what you mean?
Q. Did you go to the Engineer Depot?
A. To do what?
Q. Answer the question.
A. Yes.
Q. With whom did you go to the Engineer Depot?
A. With my brother.
Q. Franco?

A. Yes.
Q. Who else?
A. Alvaro, Siciliano, Romano and Marcello from Marina di Pisa.
Q. For what purpose did you and these other Italians go to the Engineer Depot?
A. We went to get six tires as was arranged.
Q. Arranged with whom?
A. With the sentinel on Post No. 4, who made the arrangements with my brother.
Q. At what time did you go to Post No. 4?
A. At three o'clock on the night of 13 August.
Q. Were there two Italians in your crowd by the names of Salvatore Montalbano and Teodoro Moro?
A. Yes.
Q. Had you ever gone to the Engineer Depot before for the purpose of getting property such as tires?
A. I? No.
Q. Do you know whether or not your brother Franco had gone to the depot before for the purpose of getting tires or other property?
A. Yes, because it is a long time he was here.
Q. What did your brother Franco do as he approached this Post No. 4, if anything?
A. He spoke to the sentinel on Post No. 4.
Q. What did he do before he spoke to the sentinel?
A. We were in the woods and he went over to talk to him by himself.
Q. On Post No. 4?
A. Yes.
Q. Could you recognize the sentinel who was on Post No. 4 at that time if you were to see him again?
A. Yes.
Q. Is he present in court?
A. There he is (indicating accused).
Q. How long did your brother Franco talk to the sentinel when he went over to talk to him on Post No. 4?

A. About five or six minutes — then he came back and called us and we all went over to the fence.

Q. Before Franco went over to the fence, did anyone in your crowd whistle any music?

Defense: I object to the leading question.

Law Member: Objection sustained.

Q. Did anyone in your crowd before Franco went over to talk to the accused do anything else to identify themselves?

A. I don't understand.

Q. What did you do when you went over to the fence?

A. We all we t over to the fence. He was also present —the sentinel.

Q. When you say "sentinel", do you mean the accused in this case was also present?

A. (No answer).

Interpreter: He doesn't understand the word "accused".

Q. Do you see the sentinel who was standing there with you that night—do you see him present in court now?

A. Yes, I see him present. There he is (indicating accused Gusik).

Q. When you Italians went over to that sentinel what did you do?

A. We remained outside near the fence with the intention of entering.

Q. Did you enter the depot?

A. I? No. I and Alvaro remained outside.

Q. How many Italians entered the depot at that time and place?

A. Only Marcello entered.

Q. Just one of you?

A. Yes—after a few paces the shooting began.

Q. How did this one Italian enter the depot?

A. He made a hole in the fence?

Q. With what?

A. With a jack.

Respondent's Exhibit "A".

Q. Where was the sentinel on Post No. 4 at that time?
A. He went toward Post No. 5 because he thought there was an inspection.
Q. How long was it after this one Italian went through the fence that the shooting started?
A. Three or four seconds.
Q. Did the sentinel give any command such as "Halt" before he fired?
A. Nothing.
Q. Was there anyone shot that evening?
A. No.
Q. Nobody got shot?
A. What do you mean—hit?
Q. Yes.
A. Yes—they were standing beside me—there were two dead people.
Q. Were they inside the depot or outside the depot?
A. Outside the depot.
Q. Where was Franco at that time?
A. Franco at the beginning of the shooting escaped.
Q. At the time the shooting started, was Franco inside the depot or outside the depot?
A. Outside.
Q. I show you Prosecution's Exhibit 3 for identification and ask you if you recognize the person whose photograph was taken?
A. That is Siciliano.
Q. Is that his nickname or is that his true name?
A. That is the way they were calling him.
Q. I show you Prosecution's Exhibit 4 for identification and ask you if you recognize that man?
A. This is Moro.
Q. Are these two men the men who were shot that night at that time and place?
A. Yes—in front of me.
Q. How far were they from the fence of the depot on the outside when they were shot?
A. Three meters.

Q. Who did the shooting?
A. The shots came from Post No. 5—the first shots and they were hit by the first shots.
Q. Where was the sentinel on Post No. 4 that you have identified when these first shots were fired?
A. He had gone to Post No. 5.
Q. Did the shots come from the direction of Post No. 5?
A. Yes.

Prosecution: You may take the witness.

CROSS EXAMINATION

Questions by Defense:

Q. How do you know from what direction the shots came?
A. Because Post No. 5 was in the direction from where the shots were coming.
Q. Did you see the shots?
A. I heard them come like this.
Q. Like what?
A. This is the fence and the shots were coming from over there (indicating right side of fence).
Q. How far were you from the man that you have identified here when your brother had the conversation at the fence?
A. At what distance he was?
Q. How far away were you at that time?
A. The five of us were all together.
Q. Is there a woods near that depot?
A. Yes.
Q. How far from the fence is the woods?
A. It is practically near it.
Q. What distance?
A. About 150 meters from where the trees begin. First of all there is grass there.
Q. At the time your brother had the conversation at the fence, were you in the woods or were you up at the fence?

Respondent's Exhibit "A".

A. I was near the fence. I was near Moro. After six or seven minutes, I took off. Moro was already bleeding.

Q. I am referring now to the time your brother talked to the accused in this case when you first went to the depot?

A. Who is the accused?

Q. You have testified your brother went up and talked to the man who is present in this courtroom when you first went to the depot, is that true?

A. Yes.

Q. Didn't you stop in the woods while your brother went up and talked to the accused?

A. He talked with the sentinel—the day before with the sentinel.

Q. Were you present when he talked with the sentinel the day before?

A. No.

Q. I am referring now to the night the shooting occurred. Your brother went up to the fence and talked to a sentinel—is that correct?

A. Yes.

Q. Where were you when your brother was talking to that sentinel?

A. The day before or in the evening?

Q. The night of the shooting?

A. The five of us were about 200 meters of distance.

Q. At the time your brother was talking to the sentinel?

A. Yes, then he came over to call us over while the sentinel was still present.

Q. Was it light or dark?

A. It was all lighted all around the fence.

Q. Was the sentinel present when you went over to the fence or had the sentinel walked away and gone to Post No. 5?

A. He was present. He told us to cut a hole through the fence and then went away toward Post No. 5.

Q. How many men entered the depot that night?

A. One.
Q. Where were the rest of you when he went in the depot?
A. One was inside the depot, two were hit, and I, my brother, and Alvaro escaped. I stayed there six or seven minutes and then I escaped.
Q. Did you see the sentinel to whom your brother talked?
A. Of course, my brother talked to the sentinel.
Q. Answer the question. Did you see the sentinel to whom your brother talked?
A. The sentinel spoke to my brother.
Q. Did you see the sentinel?
A. Yes, I saw him.
Q. While your brother was talking to him?
A. Yes.
Q. Could you identify him from 200 meters distance?
A. The sentinel?
Q. Yes, the sentinel?
A. I went over to him very near.
Defense: No further questions.

EXAMINATION BY THE COURT

Questions by Lt. Colonel Wellen:

Q. Did you ever see the sentinel prior to or before the night in question?
A. I saw him two or three times. My brother introduced me to him.
Q. Then you were personally acquainted with him, is that correct?
A. Yes.
Q. Was there any signal given before your brother went over to the fence on the night of 13 August 1947?
A. Yes, he was whistling "Angelina".
Q. Who was whistling "Angelina"?
A. The sentinel on Post No. 4. My brother answered and then he went over to him.

Q. How did your brother answer?
A. The same.

Questions by Lt. Von Plinsky, Jr:

Q. How long a conversation did your brother have with the sentinel?
A. Four or five minutes and then he came over to call us.
Q. How close was your brother to the sentinel when they were talking?
A. Near the fence.
Q. Answer the question. How close was your brother to the sentinel?
A. One meter or one and one-half meters.
Q. Was your brother excited or calm when he went over to talk to the sentinel?
A. He was calm.
Q. Did you see your brother all the time he was talking to the sentinel?
A. Yes.
Q. You were about 200 meters from your brother at the time?
A. Yes, approximately.

Questions by Colonel Sears:

Q. You testified that to your knowledge your brother had been out there before, is that correct?
A. Yes.
Q. At the time your brother was out there before was Salvatore Montalbano and Teodoro Moro with him?
A. I? No.
Q. Answer the question. At the time your brother was out there before was Salvatore Montalbano and Teodoro Moro with him?
A. They didn't tell me anything.
Q. Was it their custom to travel together frequently?
A. Moro and my brother were nearly always together.

Respondent's Exhibit "A".

Questions by Lt. Von Plinsky, Jr:

Q. You testified that you saw your brother as he walked to the sentinel, is that right?
A. Yes.
Q. You testified they talked for five or six minutes, is that right?
A. Yes.
Q. You testified they were about one and one-half meters apart, is that right?
A. Yes.
Q. Where was the sentinel's gun when they were talking?
A. He had it on him.
Q. Where?
A. The way you carry a gun—here (indicating left shoulder).

REDIRECT EXAMINATION

Questions by Prosecution:

Q. Was the sentinel standing inside the fence or outside the fence?
A. Inside.

RE-EXAMINATION BY COURT

Questions by Lt. Colonel Wellen:

Q. Was the sentinel still present at the fence when you went to the fence?
A. Yes.

RECROSS EXAMINATION

Questions by Defense:

Q. Had you ever been in the Engineer Depot before?
A. I? No. It was the first time.
Q. How long had you been in Marina di Pisa?
A. Twelve days. On the 13th day the incident happened.

Respondent's Exhibit "A".

Q. Had you ever been with Moro and Siciliano before?
A. I?
Q. Yes, you.
A. I? No.
Q. Did you make a statement in this case to the Criminal Investigation Division?
A. Yes.
Q. Were you telling the truth at the time you made that statement?
A. Yes, I was telling the truth.
Q. Did you at that time make this statement: "On that same night we made arrangements with three other young men who used to steal and with whom we had previously stolen." Did you make this statement that I have just read to you?
A. I said that I was present.
Q. Did you make the statement that you have previously stolen with the same three men?
A. I? No.
Q. You did not make that statement?
A. I? No.
Q. Did you further make this statement at that time: "Having the sentry's permission my brother came back to us—then the five of us went to the place as previously designated. In the meanwhile, the sentry was moving toward Post No. 5."
A. Yes.

Defense: No further questions.

There being no further questions, the witness was excused and withdrew from the courtroom.

Alessandri Alvaro, a witness for the prosecution, through the interpreter, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Allessandri Alvaro.

Respondent's Exhibit "A".

Q. Where do you live?
A. In Marina di Pisa.
Q. Do you know a Salvatore Montalbano and a Teodoro Moro?
A. Yes.
Q. I show you Prosecution's Exhibit 3 for identification and ask if you recognize the person in that photograph?
A. Montalbano.
Q. Is that Salvatore Montalbano?
A. Yes.
Q. I show you Prosecution's Exhibit 4 for identification and ask you if you recognize that photograph?
A. Moro.
Q. Is that a picture of Teodoro Moro?
A. Yes.
Q. Do you know a man by the name of Franco—an Italian?
A. Yes.
Q. Where is he now?
A. He is gone. I don't know where he is.
Q. Did you know him on the 12th and 13th of August of this year?
A. Who—Franco?
Q. Yes.
A. Yes.
Q. Did you see him on the night of the 12th and the morning of the 13th of August of this year?
A. Yes.
Q. Where?
A. Marina di Pisa.
Q. Where at Marina di Pisa?
A. I have a fruit stand.
Q. Did you go to the Engineer Depot at Tirrenia, Italy, on the 13th of August of this year in the early morning?
A. No, I wasn't there.
Q. Were you present when anybody got shot in the morning of 13. August of this year?

Respondent's Exhibit "A".

A. Yes.
Q. Wasn't that near the Engineer Depot?
A. What?
Q. Where these people were shot?
A. Yes.
Q. Who got shot?
A. Moro and Montalbano.
Q. You mean Teodoro Moro and Salvatore Montalbano whose photographs you have identified as Prosecution's Exhibits 3 and 4 for identification?
A. Yes.
Q. Who else was with you besides these two people, Montalbano and Moro?
A. Franco, Luigi, Marcello and then there was a certain Ciro.
Q. About what time of the morning did this happen?
A. About three or a quarter past three.
Q. For what purpose did you go to the Engineer Depot on that morning?
A. The previous day I had given 80,000 lira to an American.
Q. What American?
A. I don't know him. I have already told that to the commanding officer.
Q. For what purpose did you go to the Engineer Depot with these other Italians on that morning?
A. For what reason?
Q. Yes.
A. They asked me to come along with them. They said, "There is an American who is going to give us some tires".
Q. Do you know where Post No. 4 is at the Engineer Depot?
A. Yes.
Q. Was that where the shooting took place?
A. Yes, the shooting happened between Post No. 4 and Post No. 5.
Q. As you approached Post No. 4 that morning, was any signal given by anyone of your group?

Respondent's Exhibit "A".

A. Yes.
Q. What signal?
A. Franco was whistling "Angelina".
Q. Was there a sentry on Post No. 4 at that time?
A. Yes.
Q. Could you recognize that man if you were to see him again?
A. I couldn't recognize him. The lieutenant has already shown me him but I wasn't able to.
Q. Did the sentry on Post No. 4 return any signal to Franco?
A. Yes.
Q. Wha signal?
A. "Angelina"—he was whistling that also.
Q. The sentinel was also whistling "Angelina".
A. Yes.
Q. What, if anything, did Franco do after the sentry had whistled "Angelina" in reply.
A. He went nearer to the fence.
Q. What did he do when he went nearer to the fence.
A. He was talking to the sentry—him and Moro.
Q. How long did they talk to the sentry?
A. They talked about two or three minutes.
Q. Then what did Franco do?
A. Franco came back to us and told us that he has spoken to the sentinel and he is to tell the other "paesons" at once.
Q. What did Franco do then?
A. He came over to call us.
Q. Did he call you?
A. We were nearby there as agreed.
Q. Where did you go then?
A. To the fence.
Q. All of you?
A. Yes—I was at a distance of about ten meters—I and Ciro.
Q. Did anybody go through the fence into the depot?
A. Yes.

Respondent's Exhibit "A".

Q. Near what post did they go through the fence?
A. Between Posts 4 and 5.
Q. How many of you Italians went through that fence?
A. Only one.
Q. Where was the sentry when that Italian went through the fence?
A. He was going toward Post No. 5.
Q. How far away was he from the party who went through the fence when he went through the fence?
A. Ten, twelve or fifteen meters.
Q. Where were the rest of you Italians when this one Italian went through the fence?
A. I crossed the fence.
Q. You are the one who crossed the fence?
A. Yes.
Q. Where were the other Italians when you crossed the fence?
A. At the same time I was crossing through the fence, he began firing.
Q. How did you cross the fence?
A. Franco said, "One of us must cross the fence," so I said, "I will go through".
Q. How did you get through the fence?
A. A hole was made.
Q. Who made the hole?
A. Marcello Volterrani.
Q. How was the hole made?
A. The barbed wire was cut.
Q. Cut with what?
A. With pliers.
Q. Where was the sentry on that post during the time the barbed wire was being cut with the pliers?
A. While the hole was being made the sentry was right there nearby.
Q. Did the sentry at any time give the command "Halt"?
A. No.
Q. How long after the hole was cut was it that the sentry started firing?

Respondent's Exhibit "A".

A. At once. The sentry told us to enter and I entered and the shooting began at once.
Q. Where were you when the shooting started?
A. Inside.
Q. So then the hole had been cut and you had entered the hole before the shooting started?
A. This is the fence. This is the hole. While I was entering, he began firing.
Q. Where was Franco when the firing started?
A. We were all together.
Q. Where did the firing come from?
A. From Post No. 5—from that direction.
Q. Where was the sentry on Post No. 4—where was he when the firing started?
A. This I don't know.
Q. You testified that when the hole was being cut in the fence, the sentry was right there. Did the sentry leave?
A. He went toward Post No. 5.
Q. And that was the direction from which the firing was coming?
A. Yes.
Q. Was anybody struck or hit by the firing?
A. Yes.
Q. Who?
A. Teodoro Moro and Montalbano and then there was another wounded.
Q. When you say Teodoro Moro are you referring to the man whose photograph is shown in Prosecution's Exhibit 4 for identification?
A. Yes.
Q. And when you say Montalbano, do you mean Salvatore Montalbano represented by Prosecution's Exhibit 3 for identification?
A. Yes.
Q. Where were these two men when they were hit?
A. Outside the fence.
Q. How far from the fence?

A. A little distance—there is a little ditch there and there is a pole nearby.
Q. About how many meters from the fence?
A. One or one and one-half meters—near the hole.
Q. Did these two men fall when they were hit?
A. Yes.
Q. What happened to them after they were hit?
A. They picked them up and brought them inside.
Q. Inside the depot?
A. Yes—inside the camp.
Prosecution: You may take the witness.

CROSS EXAMINATION

Questions by Defense:

Q. Did Marcello go in the depot?
A. No.
Q. You are positive of that?
A. Yes, very sure. I only went inside.
Q. Who cut the hole in the fence?
A. Marcello.
Q. Who had the tools to remove the tires from the vehicles?
A. We all had tools.
Q. Had you been chased away from the Engineer Depot that night?
A. What do you mean by "chased away"?
Q. How many times did you go to the Engineer Depot the night the shooting occurred?
A. Never.
Q. Did any sentinel run you away from the fence of that depot that night?
A. No.
Q. Did you know a man called "Bob"?
A. This is another incident the same evening. Preceding there was an appointment from eleven o'clock to one o'clock that Franco and Moro had taken with an American that was named "Bobby". They went

near the fence and they went inside the camp. Then an inspection came and made them get out.

Q. What do you mean by "an inspection came"?

A. There was a jeep inside the camp with sergeants or officers so Bobby told them to go out.

Q. Was that jeep riding around in camp?

A. Yes.

Defense: No further questions.

EXAMINATION BY THE COURT

Questions by Lt. Colonel Wellen:

Q. What did you do when the firing started?

A. There were tanks piled near the fence and I climbed over them right near the fence.

Q. Who picked up the two men who were shot?

A. I was there and I heard an American voice say, "From today onwards nobody is going to enter the depot again."

Questions by Lt. Von Plinsky, Jr:

Q. How long did it take to cut the hole in the fence?

A. A little while—about five minutes.

REDIRECT EXAMINATION

Questions by Prosecution:

Q. How long did you remain in the depot after the shooting?

A. From three o'clock until half past two.

Q. You mean three o'clock in the morning until half past two in the afternoon?

A. From three o'clock or a quarter past three until two or half past two in the afternoon.

Q. What were you doing?

A. I was afraid—I had hidden myself.

Q. Did the sentinel fire at you, do you know?

A. The sentinel fired toward everybody.

Prosecution: No further questions?

Respondent's Exhibit "A".

RECROSS EXAMINATION

Questions by Defense:

Q. How many shots did you hear that night?
A. Many.

There being no further questions, the witness was excused and withdrew from the courtroom.

President: The court will take a short recess.

The court then recessed at 1500 hours and was reopened at 1515 hours, at which time all the members of the court, personnel of the prosecution and defense, who were present before the recess, resumed their seats. The accused, the interpreter and the reporter were also present.

First Lieutenant Walter P. Birmingham, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Walter P. Birmingham.
Q. You are a member of the military service of the United States with the rank of first lieutenant?
A. Yes, sir.
Q. To what organization are you assigned?
A. 1120th Engineer General Service Regiment.
Q. Directing your attention to the morning of the 13th of August 1947, were you Officer of the Day for the Engineer Depot at Tirrenia, Italy?
A. Yes, sir.
Q. Do you know the accused in this case Private Thomas A. Gusik?
A. I do.
Q. Is he present in court?
A. Yes, sir.
Q. Will you point him out?
A. Yes, sir (indicating accused).

Respondent's Exhibit "A".

Q. Was there anything unusual that happened about three o'clock on the morning of 13 August 1947?
A. I was awakened by shooting around Posts 4 and 5. I sent the corporal of the guard to investigate while I dressed. After I was dressed I took the sergeant of the guard and went out to investigate the shooting on Post 4—either Post 4 or 5—I don't know exactly.
Q. Whose post was that—who was the sentry on that post?
A. Private Gusik.
Q. The accused in this case?
A. Yes, sir.
Q. What did you find when you went there?
A. I found Private Gusik and he told me the shooting had occurred and then I heard some moaning across the fence line. I instructed the sergeant and Gusik to go outside the depot and see what it was.
Q. What did they find?
A. That brought back one dead Italian and one living Italian who had been shot.
Q. I show you Prosecution's Exhibit 3 for identification and ask you if you can identify that?
A. This is the man who was dead when brought in.
Q. You are referring to Prosecution's Exhibit 3 for identification?
A. Yes, sir.
Q. This man was dead when he was brought in.
A. Yes, he was.

Prosecution: The prosecution offers into evidence Prosecution's Exhibit 3 for identification which purports to be a photograph of the body of Salvatore Montalbano.

Defense: No objection.

Law Member: The photograph will be admitted into evidence and marked Prosecution's Exhibit 3.

Q. I show you Prosecution's Exhibit 4 for identification and ask if you recognize that?

A. Yes, I do. He is the other man who was brought in through the fence.
Q. Was he dead or alive at that time?
A. Alive.
Q. About how long after you heard the shooting was it when these two bodies were brought into the Engineer Depot from the outside?
A. Fifteen or twenty minutes.
Q. What did you do with the bodies after they were brought into the depot?
A. I sent the sergeant of the guard to get an ambulance and the ambulance took them to the Italian civilian hospital in Pisa.

Prosecution: You may take the witness.

CROSS EXAMINATION

Questions by Defense:

Q. When you got where the shooting occurred, were any other American personnel there besides the accused?
A. The other sentinel.
Q. You say you were awakened by shots. Did you hear many shots or a few shots?
A. Many shots.
Q. Did you inspect the rifles of the sentinels at that time?
A. No, I didn't at that time.
Q. Did you hear any shots after you were awakened?
A. They woke me up and I heard the firing at that time.
Q. Judging from the number of shots you heard, would you say more than one man was firing at that time?
A. It would be hard to judge—the firing sound was automatic—I couldn't say.

Defense: No further questions.

Respondent's Exhibit "A".

EXAMINATION BY THE COURT

Questions by President:

Q. Did you have two sentries—one on Post No. 4 and one on Post No. 5, or one sentry for the two posts?
A. One on each post—two sentries.
Q. How far does Post No. 4 extend? What is the limits of Post No. 4.
A: I am a little confused as to the location of these posts. I would say Post No. 4 is the one along the fence line. It is about 200 yards in length.
Q. When the bodies were brought into the depot, how were they brought in?
A. They were brought in through a hole in the fence by the two men.

Questions by Lt. Colonel Wellen:

Q. Who was the sentry on Post No. 5?
A. I don't remember the man's name.
Q. I believe you stated that the rifles were not examined at that time. Were they ever examined?
A. That I do not know. I did not examine them.

RECROSS EXAMINATION

Questions by Defense:

Q. Do Posts No. 4 and No. 5 overlap?
A. One is a stationary post and one is a walking post.
Q. Which one is the stationary post?
A. I believe No. 5 is stationary.
Q. How far is Post No. 5 from where the shooting occurred approximately?
A. About 150 feet.
Q. Who were the two men who brought the bodies in?
A. One was Sergeant Sopko and the other, I believe, was Private Gusik.
Q. What time did you inspect the guard that night, Lieutenant?

A. I inspected the guard at numerous times.
Q. What time was the last time?
A. I would say about a half hour or three-quarters of an hour before the shooting occurred. I can't say exactly.
Q. Around two o'clock?
A. I would say around two o'clock.
Q. Do you know if there were any inspections after yours? Does the sergeant of the guard make any inspections?
A. He did not that night.
Q. Who was the sergeant of the guard that night?
A. Sergeant Gagnon.
Q. Is that the same sergeant who helped the accused bring the two bodies into the depot?
A. No, it wasn't.
Defense: No further questions.

RE-EXAMINATION BY THE COURT

Questions by President:

Q. You were the Officer of the Day that day?
A. Yes, Sir.
Q. What was the result of your investigation after you went out and investigated the firing?
A. I didn't attempt to investigate the shooting. I went back and called the CID to do the formal investigating. I didn't attempt to do it.
Q. You didn't try to find out who fired the shots?
A. The man admitted it.

RECROSS EXAMINATION

Questions by Defense:

Q. There was another sentinel present at the time?
A. Yes, sir.
Q. Did he admit firing any shots?
A. No, he didn't. He didn't speak to me at all.
Defense: No further questions.

Respondent's Exhibit "A"

RE-EXAMINATION BY THE COURT

Questions by Lt. Colonel Wellen:

Q. Did you make any official report on the incident?
A. Only that the shooting had occurred and that the investigation had been left up to the CID.

Questions by President:

Q. When you say he admitted firing the shots, do you mean the accused?
A. Yes, sir.

There being no further questions, the witness was excused and withdrew from the courtroom.

Ideale del Carpio, a witness for the prosecution, through the interpreter, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Ideale del Carpio.
Q. Where do you live?
A. In Pisa, Italy.
Q. What is your business or occupation?
A. Teacher of legal medicine at the University.
Q. What school did you graduate from?
A. Florence University.
Q. What degree do you have?

Defense: We will stipulate that the man is qualified.

Law Member: The court will accept the stipulation.

Q. Showing you Prosecution's Exhibit 3 in evidence, did you perform an autopsy on that body on or about 13 August 1947?
A. Yes.
Q. After having performed the autopsy, can you tell the court what the cause of death was?

A. If I remember well, the victim presented a gunshot wound.

Q. Would you say the gunshot wound was the cause of death?

A. Yes, because the lungs were bruised and there was an interior hemorrhage.

Q. Showing you Prosecution's Exhibit 4 for identification, I ask you whether or not you performed an autopsy on that body on or about 14 August 1947?

A. Yes.

Q. Having performed the autopsy, can you tell this court the cause of death?

A. Even in this case there was lesion of the lungs and heart and also interior hemorrhage.

Q. What was the cause of death?

A Interior hemorrhage.

Q. Caused from what?

A. From a gunshot wound.

Prosecution: At this time the prosecution offers into evidence Prosecution's Exhibit 4 for identification, which purports to be a photograph of the body of Teodoro Moro.

Defense: No objection.

Law Member: It will be admitted into evidence and marked Prosecution's Exhibit 4.

Q. At the time you saw both parties represented by Prosecution's Exhibits 3 and 4, they were both dead, is that true?

A. Yes.

Prosecution: No further questions.

CROSS EXAMINATION

Questions by Defense:

Q. Have you performed many autopsies on people who have died from gunshot wounds?

A. Yes, many.

Respondent's Exhibit "A".

Q. As a medical doctor performing such autopsies, do you consider yourself qualified to render an opinion as to the caliber of different sized bullets?

A. As regards Montalbano, it was a trespassing wound. The diameter of the entrance hole was rather small and could be considered of a caliber between seven and eight millimeters. As regards Moro, we had two entrance holes. In the autopsy, it was found that one of these wounds, the one situated in the anterior part of the thorax had been determined by the cover of a bullet so the hole was large and did not correspond to what should have been the caliber of the bullet. The outside of the slug was rather fringed and we could not identify the weapon according to the lines. The other hole on the right side of the thorax had been determined by the same nucleus of the lead of the same bullet probably and the bullet was found in the posterior region of the thorax at the left underneath the rib. From the examination of these fragments, we could determine that the weapon was a long one and of a medium caliber. If the court is interested, I have the pieces in the institute in Pisa. I have kept them at the disposal of the authorities.

Defense: No further questions.

There being no further questions, the witness was excused and withdrew from the courtroom.

Private Ursl B. Parker, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?

A. Private Ursl B. Parker.

Q. You are a member of the military service of the United States?

A. Yes, sir.

Respondent's Exhibit "A".

Q. With the grade of private?
A. Yes, sir.
Q. What is your organization?
A. At the present time 7103rd Disciplinary Training Company.
Q. On the 13th day of August to what organization were you assigned?
A. The 7156 Engineer Guard Company, sir.
Q. Was that organization on guard that day at Engineer Depot near Tirrenia, Italy?
A. Yes, sir.
Q. Do you know the accused in this case, Private Gusik?
A. Yes, sir.
Q. Is he present in court?
A. Yes, sir.
Q. Will you point him out?
A. Yes, sir (indicating accused).
Q. Did you have a conversation with Private Gusik on the afternoon of 12 August 1947?
A. I am pretty sure that it was that day.
Q. Did you later learn about some shooting in which two Italians had been killed?
A. Yes, sir.
Q. Was it the day before the shooting that you had this conversation with Private Gusik?
A. Yes, sir.
Q. Who was present at that conversation besides you and Private Gusik?
A. No one.
Q. Where was the conversation had?
A. In the company, sir.
Q. At the Engineer Depot?
A. Yes, sir.
Q. Relate to the court the substance of that conversation.
A. Well, it was sometime—I think it was in the afternoon and I saw Private Gusik—we slept in the same tent together—and I told him that I had some Italians

who were to come to my post on that night as I was on Post No. 2 and I told him if he wanted me to I would send them over to his post.

Q. What was his reply?
A. He said, "OK".
Q. You were on the third relief that night?
A. I think it was.
Q. What time did you go on guard that day?
A. When the Italians came to my post, I was on from eleven until one o'clock.
Q. Did you at that time know the post the accused Gusik was on?
A. Yes, sir.
Q. Did you know what relief he was on?
A. Yes, sir.
Q. Did Gusik tell you what time to send the Italians to his post?
A. Yes, sir.
Q. What time did he tell you to send the Italians?
A. Between 0300 and 0500 hours.
Q. To what post?
A. Post No. 4.
Q. Did he tell you for what purpose he wanted the Italians to come to Post No. 4?
A. I am not exactly sure, sir, but I know when anyone goes to that post, it is for tires.
Q. Do you know an Italian named Franco?
A. Yes, sir.
Q. How long have you known him?
A. A very short time.
Q. Did you know him previous to 13 August 1947?
A. Yes, sir.
Q. Was he one of the Italians you were referring to?
A. Yes, sir.
Q. Was there any pre-arranged signal between Franco and you and the accused Gusik?
A. I told Gusik if I sent them over there, they would be whistling "Angelina" and that was the signal I used.

Respondent's Exhibit "A".

Q. Did you later see this Italian named Franco?
A. Yes, sir, that night, sir.
Q. Where?
A. He came to my post around 11:15.
Q. Was he alone?
A. No, sir.
Q. Who was with him?
A. He had some other Italians with him but I don't know exactly who they were because there were only two who came in on my post.
Q. At the time you saw Franco around eleven o'clock that night, did you send Franco to Post No. 4 at three o'clock in the morning.
A. When he came to my post I told him if he couldn't do anything on my post, he could go over to Tom's post and work there.
Q. Tom who?
A. Gusik.
Q. The accused in this case?
A. Yes.
Q. Did you tell Franco to identify himself by whistling "Angelina"?
A. Yes.
Q. Did Franco leave your post?
A. Yes, sir—when the OD came he left and I didn't see him any more.

Prosecution: You may take the witness.
Defense: I have no questions.

There being no further questions, the witness was excused and withdrew from the courtroom.

Private First Class Frank Zahurones, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Frank Zahurones.

Respondent's Exhibit "A".

Q. You are a member of the military service of the United States?
A. Yes, sir.
Q. What is your grade?
A. Private first class, sir.
Q. Assigned to what organization?
A. 7156th Engineer Guard Company.
Q. Were you assigned to that organization on 13 August 1947?
A. Yes, sir.
Q. What were your duties the early morning of 13 August 1947?
A. I went on guard at three o'clock in the morning.
Q. On guard where?
A. On Post No. 5.
Q. That post is at the Engineer Depot near Tirrenia, Italy?
A. Yes, sir.
Q. Do you know the accused in this case Private Gusik?
A. Yes, sir.
Q. Is he present in court today?
A. Right there (indicating accused).
Q. What time did you go on guard duty on 13 August 1947?
A. At three o'clock in the morning.
Q. Was Private Gusik on guard duty?
A. He went on guard the same time I did.
Q. At three o'clock in the morning on 13 August 1947?
A. Yes, sir.
Q. How long was the tour of duty?
A. Two hours—until five o'clock.
Q. For both of you?
A. Yes, sir.
Q. What post were you on?
A. Post No. 5.
Q. What post was Private Gusik on?
A. On Post No. 4.
Q. Is Post No. 5 a stationary post?

A. It is just walking around the gate and watching that nobody goes in the area.
Q. What kind of a post is Post No. 4?
A. He had to walk around inside the area.
Q. Shortly after you went on duty, did anything unusual happen?
A. I heard one of these little Italian motor cars out on the road and didn't pay no attention to it. Private Gusik and I were talking together—I mean Gusik was walking on his post. As he was walking on his post, I hear him whistling a tune.
Q. What tune?
A. "Angelina".
Q. Continue.
A. I was standing by the fence and he was walking in the area and I didn't pay much attention to it. Pretty soon over the fence in the woods someone else whistled the same tune.
Q. Whistled "Angelina"?
A. Yes, sir.
Q. Continue.
A. They were whistling there for a while and then I heard someone say, "Tom" and the reply was "Franco" and I didn't hear anything else until the shots came.
Q. Where did the whistling come from?
A. Close and then a little ways out.
Q. So it sounded like two people were whistling "Angelina?"
A. Yes, sir.
Q. From what direction did you hear the name "Tom"?
A. In the woods.
Q. From what direction did you hear the name "Franco" mentioned?
A. That sounded close to me.
Q. How far was the accused from you when you heard the name "Franco"?
A. Down along the fence.

Respondent's Exhibit "A".

Q. How far approximately?
A. I would say about 100 feet.
Q. Did you at any time hear the accused give the command "Halt"?
A. No, sir, I didn't.
Q. Did you hear anything after you heard the word "Franco"?
A. Nothing else until the shots started.
Q. How long after you heard the word "Franco" was it that the shots started?
A. About five minutes.
Q. How far was Gusik from you at the time the shots started?
A. About 100 feet.
Q. How many shots did the accused Gusik fire?
A. I could not tell.
Q. Did you see any Italians enter the depot about that time or just before the shooting?
A. No, sir, I didn't.
Q. Did you fire any shots?
A. Yes; sir, I fired thirty rounds.
Q. How long was that after Gusik had fired?
A. He fired about fifteen or twenty rounds and then I started to shoot.
Q. In which direction?
A. Up toward the woods.
Q. In which direction was Gusik firing?
A. I believe he was firing toward the woods too.

Prosecution: You may take the witness.

CROSS EXAMINATION

Questions by Defense:

Q. What were you firing at Zahurones?
A. I couldn't see nothing. I was just firing out toward the woods.
Q. Did you see or hear anything out in the direction that you fired?

A. Over the fence I heard the woods crash. I was shooting out that way through the trees.
Q. What type of weapon were you armed with?
A. A carbine.
Q. What type was the accused armed with?
A. A carbine.
Q. Did you fire any more shots after you fired the thirty rounds?
A. No, sir.
Q. Is there a signal that you had to call the corporal of the guard?
A. Three shots.
Q. Was any signal fired?
A. I went out to the road and fired three shots in the air and the corporal of the guard didn't come so I hollered for him.
Q. Was that after or before you fired the thirty rounds?
A. After, sir.

Defense: No further questions.

EXAMINATION BY THE COURT

Questions by President:

Q. You were the sentry on Post No. 5?
A. Yes, sir.
Q. You say the accused was a hundred feet from you when he fired?
A. Yes, sir.
Q. Where was he firing?
A. Toward the fence.
Q. You fired toward the woods?
A. Yes, sir.
Q. You fired high?
A. Yes, sir.

Questions by Lt. Colonel Wellen:

Q. Are you well acquainted with the accused?
A. I just spoke to the accused. We never went out together.

Respondent's Exhibit "A".

Q. Do you recognize his voice?
A. Yes, sir.
Q. Did you recognize the accused voice when you heard "Franco"?
A. Yes, sir.
Q. Was it the accused's voice?
A. Yes, sir.
Q. How far was he from you at that time?
A. Like I said—about 100 feet.
Q. Did you see any persons at that time?
A. No, sir.
Q. Was the area lighted?
A. Yes, sir. There were lights all around.
Q. Was there any obstruction between you and the post occupied by the accused?
A. Yes, sir, about four rows of vehicles, sir.

Questions by Lt. Von Plinsky, Jr:

Q. After you heard the accused call "Franco", how long was it before you heard shots?
A. About five minutes.
Q. Did the accused walk up to you and start shooting?
A. He didn't walk up to me before he started to shoot.
Q. He shot at the fence and then walked up to you?
A. He stayed by the first row of vehicles, and I called the corporal of the guard.
Q. You fired thirty rounds and then called the corporal of the guard?
A. Yes, sir.
Q. How far was the accused from you when he first fired?
A. About twelve feet.
Q. Yet he was about 100 feet from you when the conversation first took place?
A. Yes, sir.
Q. Did you see the accused when he was talking to Franco?

A. No, sir.
Q. You couldn't see him?
A. No, sir.

Questions by Lt. Colonel Wellen:

Q. Where was the accused with regard to the row of vehicles when he fired the shots?
A. He was about three or four feet away from the fence.
Q. Where were the vehicles?
A. There is a first row of vehicles about four feet from the fence and there are other rows all the way up to the road.
Q. Was there a row of vehicles between the spot where the accused was standing when he fired and the point where he spoke to Franco?
A. No, sir.
Q. Did you see the accused when you heard the word "Franco" spoken?
A. No, sir.

RECROSS EXAMINATION

Questions by Defense:

Q. What position did you fire from?
A. From a standing position.
Q. How high did you fire?
A. Up above the fence line, sir.
Q. You say you fired in the direction of the woods and the accused fired in the direction of the fence. Where is the woods in relation to the fence?
A. It is right on the outside of the fence.
Q. Then in the direction you were firing, you were also firing in the direction of the fence?
A. Yes, sir, that is right.
Q. Did you hear any shots before the accused started shooting?
A. No, sir.
Q. Did you see him when he started shooting?

A. No, sir.
Q. Do you know whether he fired from a prone or a standing position?
A. No, sir, I don't.
Q. What did you do when the shooting started?
A. I went up between the second and third row of vehicles from the fence behind the vehicles and started shooting from there.
Q. You saw nothing to shoot at?
A. No, sir.
Q. Did you see anybody moving—any grass moving?
A. I seen the grass moving on the outside and shot above it.
Q. You didn't see the accused shoot at all?
A. No, sir.
Q. He was at the first line of vehicles?
A. Yes, sir.
Q. You were at the third line of vehicles?
A. Yes, sir.
Q. You heard nothing prior to the shooting?
A. No, sir.
Q. Were any vehicles moving around in your area at that time?
A. No, sir, there wasn't.
Q. Does your post meet the accused's post?
A. You have to go through Post No. 5 to go on Post No. 4.
Q. It is right beside it?
A. Yes, sir.
Q. At the time you were talking to the accused were you on your post?
A. Both the same—it is all one post—each was on his own post.
Q. The two posts meet.
A. Yes, sir, that is right.
Q. How far from where the two posts meet, did the shooting occur?
A. About 200 feet.

Respondent's Exhibit "A".

Q. 200 feet in the direction of your post or in the direction of Post No. 4?
A. Direct from my post up toward the fence is where the shooting was.
Q. You say the accused was about 12 feet from you when he started shooting but you couldn't see him because of the vehicle between you?
A. That is right.
Q. At the time you heard the words "Tom" and "Franco", he was about 100 feet away from you?
A. That is right.
Q. Did you hear anything like wire being cut?
A. No, sir, I didn't.
Q. Did you hear anybody holler?
A. No, sir.
Q. Did you hear anybody holler after the shooting started?
A. Yes, sir, there was an Italian moaning after the shooting stopped.
Q. Did you start firing simultaneously with the accused or did you start after he stopped?
A. We were both shooting at the same time.
Defense: Nothing further.

RE-EXAMINATION BY THE COURT

Questions by President:

Q. How high is this fence?
A. I would say about seven feet.
Q. How far were you from the fence when you fired?
A. I can't say exactly—about fifty feet.
Q. Were you firing perpendicular or parallel to the fence?
A. Right straight toward the fence and above the fence.

Questions by Lt. Sherman:

Q. What is the fence made of—stone, barbed wire or what?
A. Barbed wire.

Respondent's Exhibit "A".

Questions by Lt. Lowther:

Q. How can you say the accused was firing down the fence line when you couldn't see him?
A. It was toward the fence—whether down the line of the fence or in, I don't know.

Questions by Lt. Von Plinsky, Jr:

Q. When the accused started firing he was 12 feet from you?
A. When I started firing I was twelve feet from him—I ran down.
Q. How many shots were fired before you ran down?
A. About fifteen or twenty shots.
Q. Did you see anything along the fence as you ran down?
A. No, sir.

REDIRECT EXAMINATION

Questions by Prosecution:

Q. After the firing stopped, two bodies were found?
A. Yes, sir.
Q. Had you been firing in the direction where these bodies were found?
A. Yes, sir.

RE-EXAMINATION BY THE COURT

Questions by Lt. Colonel Wellen:

Q. Is the ground level there?
A. Right outside the fence is a ditch.
Q. At what angle were you holding your weapon?
A. From my side.
Q. Was the muzzle elevated or level.
A. Elevated and pointed toward the fence.
Q. What degree angle?
A. 45 or 50 degrees.

Respondent's Exhibit "A".

RECROSS EXAMINATION

Questions by Defense:

Q. Did you fire in rapid succession?
A. Yes, sir.
Q. You fired from the hip?
A. Yes, sir.

Defense: No further questions.

There being no further questions, the witness was excused and withdrew from the courtroom.

Agent Robert M. Urdinarrain, a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. What is your name?
A. Robert M. Urdinarrain, Agent, Criminal Investigation Division, Leghorn, Italy.
Q. Do you know the accused, Private Thomas A. Gusik?
A. Yes, sir.
Q. Did you have occasion to have a conversation with him on 15 September 1947?
A. Yes, sir.
Q. Where?
A. In the CID office in Leghorn.
Q. At that time did you explain to him his rights under the 24th Article of War?
A. Yes.
Q. What did you tell him?
A. I read off the 24th Article of War from the paragraph on the statement form and if I am not mistaken, I also read the 24th Article of War out of the Manual.
Q. Did you make him any promises of immunity or reward in return for a written statement?
A. No, sir.
Q. Did you threaten him in any manner to get a written statement?

A. No, sir.
Q. Did he give you a written statement?
A. Yes, sir.
Q. I show you Prosecution's Exhibit 5 for identification and ask if you recognize that document?
A. Yes, sir.
Q. Is that the statement that you have just testified to?
A. Yes, sir.
Q. That statement consists of two pages. Referring to the second page there is a signature there, "Thomas A. Gusik". Is that the signature of the accused in this case?
A. Yes, sir.
Q. Was that signed in your presence?
A. Yes, sir.

Prosecution: The prosecution offers into evidence Prosecution's Exhibit 5 for identification, which purports to be a statement by the accused.

Defense: No objection.

Law Member: The statement of the accused will be admitted into evidence and marked Prosecution's Exhibit 5.

(The trial judge advocate then read Prosecution's Exhibit 5 in evidence to the court.)

Q. Private Gusik mentioned in that statement some photographs that had been shown to him. I show you Prosecution's Exhibits 3 and 4 in evidence and ask you if those were the photographs shown to Private Gusik at the time the statement was taken?
A. Yes, sir.
Q. Can you identify the one Private Gusik identified as being Moro?
A. Prosecution's Exhibit 4.

Prosecution: You may take the witness.

Defense: No questions.

There being no further questions, the witness was excused and withdrew from the courtroom.

Respondent's Exhibit "A".

Prosecution: The prosecution rests.

Defense: May we have a short recess?

President: The court will recess for five minutes.

The court then recessed at 1620 hours and was reopened at 1630 hours, at which time all the members of the Court, personnel of the presocution and defense, who were present before the recess, resumed their seats. The accused, the interpreter and the reporter were also present.

Defense: May the accused be advised of his rights by the court.

(The rights of the accused were then explained to him in detail by the court according to TM 27-255.)

President: Knowing these various rights, take time to consult with your counsel and then state to the court which you will do.

Accused: Sir, I wish to remain silent.

Defense: The defense rests.

The prosecution announced that it had no further testimony to offer.

The defense announced that it had no further testimony to offer.

Short oral arguments were made by the defense and the prosecution.

Neither the prosecution nor the defense having anything further to offer, the court was closed and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds the accused:

Of Specification 1 of the Charge: Guilty.

Of Specification 2 of the Charge: Guilty.

Of the Charge: Guilty.

The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions to submit.

The trial judge advocate read the data as to age, pay and service, and data as to restraint of accused as shown on the charge sheet as follows:

Respondent's Exhibit "A".

AGE: 18 3/12 Pay $90.00 per month. Class "E" allotment — $25.00 per month.

Government Insurance Deduction—$6.40 per month.

Data as to service: No prior service. Enlisted in Regular Army on 19 July 1946 at Cleveland, Ohio to serve for one and a half years. Overseas 2 December 1946. Authorized to wear: Glider Badge, Occupation Medal for Italy.

Data as to restraint of accused: Confined at MTOUSA Disciplinary Training Center on 3 September 1947.

Prosecution: Private Gusik, is the data I have just read correct?

Accused: Yes, sir.

The court was closed and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences the accused:

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

The court was opened and the President announced the findings and sentence.

President: The court will recommend clemency in this case of Private Gusik?

Prosecution: That is the unanimous opinion of the court?

President: It is.

The court then at 1750 hours on 9 October 1947 adjourned to meet at the call of the President.

V. N. CORDERO
Colonel, Infantry
President

DONALD C. YOUNG
Captain, QMC
Trial Judge Advocate

I examined the record before it was authenticated.

CLARENCE W. BURKS
1st Lt., Infantry
Defense Counsel

Respondent's Exhibit "A".

HEADQUARTERS
PORT OF LEGHORN
UNITED STATES ARMY
APO 512

13 October 1947

In the foregoing case of Private Thomas A. Gusik, RA 15 220 411, 7156th Engineer Guard Company (Overhead), the sentence is approved. Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of the Army may direct, is designated as the place of confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.

REMINGTON ORSINGER
Colonel, Infantry
Commanding

PROSECUTION'S EXHIBIT 1.

PORT OF LEGHORN
CRIMINAL INVESTIGATION DIVISION
OFFICE OF THE PROVOST MARSHAL
APO 782 U S ARMY

E-X-T-R-A-C-T

Extracted from: HEADQUARTERS
1170th ENGINEER GENERAL SERVICE REGIMENT
APO 782 U S ARMY
20 July 1947

SUBJECT: Depot Security
TO: All concerned

ORGANIZATION OF GUARD — SECTION I
DUTIES OF THE OFFICER OF THE DAY — SECTION II
SPECIAL ORDERS FOR POST — SECTION III
SPECIAL ORDERS FOR SECURITY GUARD — SECTION IV

Prosecution's Exhibit 1.

Paragraphs 1 and 2 of Section III—Special Orders for Post.

"SECTION III—SPECIAL ORDERS FOR POSTS

1. Post Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9.

(a) My post is a 24 hour fence post. In case the lighting system becomes out of order, I will immediately report this incident to the Sergeant of the Guard.

(b) The tower being in the center of my post, I will walk halfway between the tower on my right and left.

(c) I will check the fence line for holes and will notify the Sergeant of the Guard if any are found.

(d) Any person loitering near the fence after the hours of darkness will be fired upon after challenging.

(e) Between 1700 hours and 0800 hours no unauthorized person or vehicles will be in my area.

(f) I will check with the Sergeant of the Guard, by telephone, every hour on the hour.

(g) In case any person is in my area I will call "halt". If the person fails to halt I will fire a warning shot in the air. If the person still fails to halt I will shoot to kill.

(h) In case of fire I will immediately notify the Sergeant of the Guard.

2. Post No. 10.

(a) My post is a 24 hour walking post.

(b) My post extends from the road, past the vehicles parked by the corner along the ARAR fence to the ARAR gate. No unauthorized person will tamper with government property parked in this area.

(c) In case of fire I will immediately notify the Sergeant of the Guard.

(d) Between the hours of 2000 and 0600 my post will be the Officer's Club and parking lot.

(e) At the Officer's Club I will allow nobody to tamper with military vehicles parked in the parking lot and after midnight I will inspect around the Officer's Club".

"A TRUE EXTRACT COPY"
JOHN S. STRANO,
2nd Lt., CMP
Incl. No. 19.

PROSECUTION'S EXHIBIT 2.

7156 ENGINEER GUARD COMPANY OVERHEAD
UNITED STATES ARMY
APO 782

11 August 1947

GUARD DETAIL: 12 August 1947
OFFICER OF THE DAY: Lt. Birmingham
SGT OF THE GUARD: S/Sgt Gagnon

1st Relief	2nd Relief	3rd Relief
Sgt. Hubbert	Sgt. Sopko	Sgt. Walkley
1. Gilleland	1. Martinez R	1. Pielech
2. Sharp	2. LeGath	2. Parker
3. Doss	3. Johnston	3. Clem
4. Lacey	4. Gusik	4. Stephens
5. White	5. Zahurones	5. DeBuel
6. Sultzbaugh	6. Martin	6. Miller C. J.
7. Biegler	7. Bernier	7. McCabe
8. Barnes	8. Bedolla	8. Martinez
9. Nielson	9. Barton	9. Zavesky
10. Pearce	10. Hoy	10. Hoagland
11. Ulrich	11. Alderman	11. Fennell
12. Perzel	12. Gibson	12. Campos
13. Jandrositz West	13. Friedman Smallman	13. Nichols Metzler

FOR THE BATTERY COMMANDER
s/ Robert H. Sykes
1st Sgt. Robert H. Sykes

"A TRUE COPY"
JOHN S. STRANO
2nd Lt., CMP
Incl. 17.

CONFIDENTIAL

body of MONTALBANO SALVATORE di Vincenzo and di Arienzi Giovanna, born on 27 Jan. 1928, residing at Vicolo S. Chiara 2?7, Palermo.

Shot and killed on 13 August 1947, while attempting to commit a larceny inside of Depot EL?8.

EXHIBIT "C" CONFIDENTIAL

CONFIDENTIAL

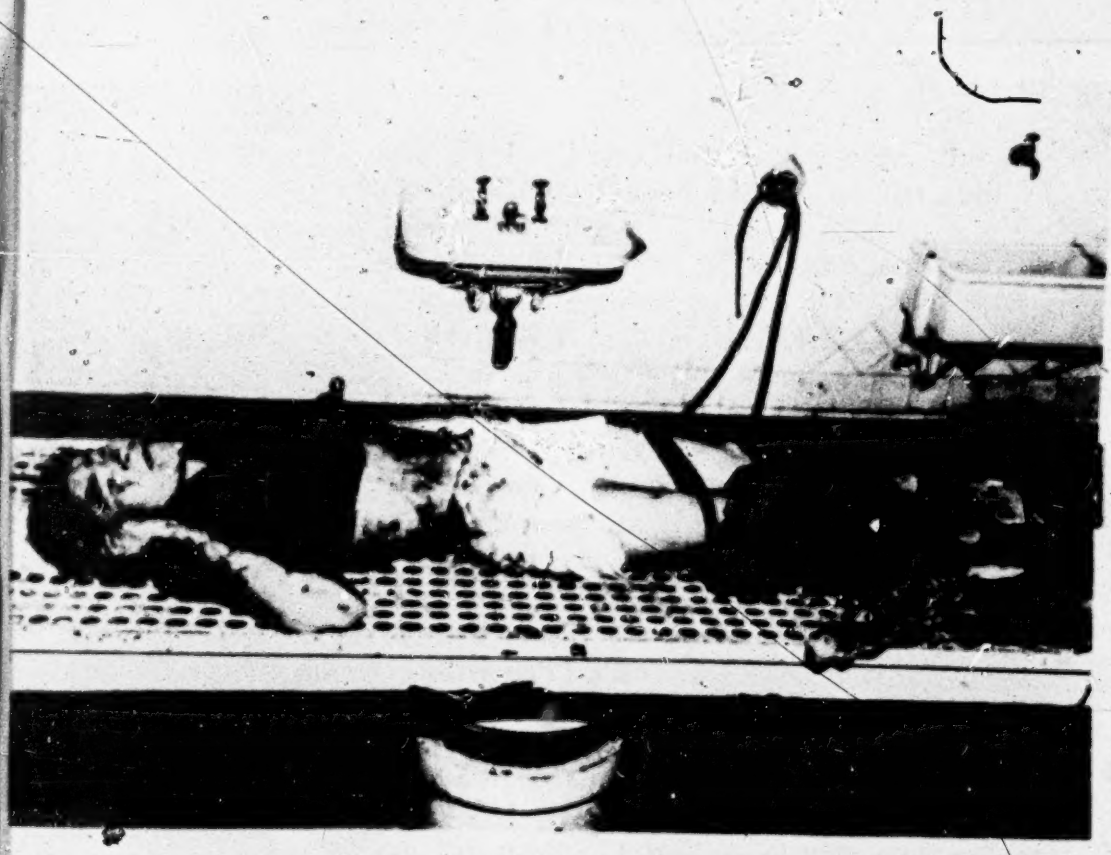
RESTRICTED

Prosecution's Exhibit 3.

CONFIDENTIAL

Body of MORO TEODORO.

Shot and killed on 13 August 1947, at Depot 21.76, while attempting to commit a larceny inside of depot 21.76.



CONFIDENTIAL

SECRET [illegible]

SECURITY INFORMATION

RESTRICTED

Prosecution's Exhibit 4.

PROSECUTION'S EXHIBIT 5.

PORT OF LEGHORN
Office of the Provost Marshal
CRIMINAL INVESTIGATION DIVISION
APO 782 U. S. ARMY

STATEMENT OF PVT. THOMAS A. GUSIK, RA 15220411, 7156th Engr. Guard Co. Ovhd. In the Case 47/220

Given at (Time) 1600 hours (Date) 15 September 1947 (Place) C.I.D. Office, Leghorn

In the presence of ROBERT M. URDINARRAIN, Agent, C.I.D.

Officer taking statement: Thomas A. GUSIK. Under the 24th Article of War, it is my duty to warn you of your rights in this case. You are not required to make a statement. You may remain silent. However, if you do answer my questions or make any statements, whatever you say may be used against you, should this investigation result in a trial. Do you understand what I have just said? (Answer): YES.

I arrived in the Port of Leghorn on 26 December 1946. I was then sent to the 149th Replacement Depot, later on on 28th December 1946 I was transferred to the 88th Division to the 913th Field Artillery I then left the 88th Division on March 7th 1947. I was then stationed on Depot 2L76, with the 913th F. A., later I became the 7156 Engr. Guard Company. While I was with the 7156th, I came to know a certain FRANCO. I got to know him sometime in May 1947; the way I got to know this FRANCO was on May 1947, when he first approached me, and asked me if I wanted to sell any gas or tires. Then, in the month of June 1947, I made by first deal, with FRANCO, I told FRANCO what post I was going to be on, and at what time to come in. I do not recall the date and time, only that it was the early morning hours. I let FRANCO and two Italians named DI PINTO LUIGI, and MARCELLO get into the Depot.

On this deal, the three Italians did not steal anything, due that they had not brought any tool with them, because they intended to take tires out. After this, FRANCO would approach me, but I did not make any deal with him, because I did not know what post I would be on. Then on the 11th of August 1947, I knew what Post I was going to be on. I then got a pass and went out to look for FRANCO, to tell him to bring his gang, so that the deal could be pulled. Instead I met MORO who I knew was one of FRANCO's men, I told MORO to tell FRANCO that I would be on Post No. 4, from 0300 hours to 0500 hours 13th August 1947. MORO then told me that he would see FRANCO and tell him. I also told MORO to tell FRANCO to whistle the tune of Angelina; The tune Angelina was used in both deals, I was involved. I was shown a statement given by WILLIAM E. HOAGLAND, by Agent URDINARRAIN, dated 4 September 1947, on one page and sworn to, on the 12th of August 1947, and confirmed the same on every detail, except the part where I said I'll get FRANCO. I have identified the photograph shown to me by Agent URDINARRAIN, as one of the two men I had spoken to as was mentioned in HOAGLAND statement. One of these two men, I later shot on 13th August 1947. I have seen this same man with FRANCO, when he approached me. Pvt. PARKER told me before going on guard the next day, that he also had made a deal with FRANCO. On 13th August 1947, I went on duty at 0300 hours, on Post No. 4. As soon as I got on my Post, I started to whistle "Angelina". While whistling (Angelina), I kept walking along the fence line, waiting for FRANCO to whistle (Angelina) so that I could give him the OK to come inside of the Depot. About half an hour later, I heard someone whistling (Angelina). I knew it was FRANCO and his gang. A few minutes later, FRANCO came out to the fence. FRANCO then told me "Where can I let them in?". I replied that he could not come in, because the O.D., Lt. BIRMING-

HAM, was checking the area. FRANCO was mad because I had made a deal with him and then I did not want to go through with the deal. FRANCO then walked off into the woods. I then started to go towards Post No. 5, when someone fired upon me. I crawled under the stone crusher. I stayed under the stone crusher for a while, then I got behind the stone crusher, then I got up and walked towards Post No. 5, where ZAHURONES was. On my way to ZAHURONES, I heard someone by the fence, it sounded like someone was cutting the wire fence. I then saw some civilians enter the area. I shouted "Halt" but no one stopped. I then halted the civilians the second time. This time, the civilians started to go through the fence. I then fired at the civilians. I fired between two to fifteen rounds, in my first burst, being that my gun had jamed (Cal. 30 Carbine T-4 No. 000571). On my second burst I fired about fifteen rounds. I then fired another clip, in order to get the Cpl. of the Guard to come to my Post, I fired three clips in all. The Cpl. of the Guard arrived (Cpl. SOPKIO). The Cpl. and myself went outside of the fence, and brought in the two wounded Italians. After we had brought the two wounded Italians, I recognized one of the Italians to be the same man in the photography shown to me in the C.I.D. Office. Later, the ambulance arrived and the two Italians were taken to the Hospital. I am positive that the shots fired from my gun killed the two Italians, because I was the closer one to them, and the first one to fire. Even though I had dealt with this group, headed by FRANCO, the reason I shot the two men was because they did not halt; the reason why I shot them was because they did not stop after I had hollered halt twice. The Halt business came after I had spoken to them the first time. I knew that PARKER was involved in about three or four deals, or more, because he told me so. I do not remember the exact details. I

know that he was involved with many other members of the guard details, I do not remember the names.

Signature Thomas A. Gusik

Subscribed and sworn to before me this 15th of September, 1947.

John S. Strano 2nd Lt., C.M.P.
SUMMARY COURT

I certify that the 24th Article of War was read and thoroughly explained to the deponent by me prior to any questioning.

Signature R. M. Urdinarrain

Incl. No. 15.

RESPONDENT'S EXHIBIT B.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

Washington, 12 August, 1948

I hereby certify that the attached copy of General Orders No. 39, War Department, Washington, dated 10 April 1947, is a true and exact copy of General Orders No. 39, 10 April 1947, as originally promulgated by the War Department.

EDWARD F. WITSELL
Major General, U. S. Army
The Adjutant General

I hereby certify that MAJOR GENERAL EDWARD F. WITSELL, U. S. ARMY, who signed the foregoing certificate is THE ADJUTANT GENERAL, U. S. ARMY, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I, Kenneth C. Royall, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and

Respondent's Exhibit "B".

my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 13th day of August, 1948.

Kenneth C. Royall,
Secretary of the Army.

(SEAL)

By James C. Cook,
Deputy Administrative Assistant.

GO 39

GENERAL ORDERS No. 39

WAR DEPARTMENT
Washington 25, D. C., 10 April 1947

Section

GENERAL COURTS MARTIAL—
Authority to appoint granted I
LEGION OF MERIT—Awards ..... II, III
BRONZE STAR MEDAL—Awards IV
AIR MEDAL—Awards V
ARMY COMMENDATON RIBBON—Awards VI
AIR MEDAL—Correction in general orders ... VII

I GENERAL COURTS MARTIAL.—By direction of the President, the commanding officer, Port of Leghorn, is empowered, pursuant to the eighth article of war, to appoint general courts martial.

[AG 250.401 (8 Apr 47)]

II LEGION OF MERIT.—By direction of the President, under the provisions of the Act of Congress approved 20 July 1942 (sec. III, WD Bul. 40, 1942) and Executive Order 9260, 29 October 1942 (sec. I WD Bul. 54, 1942), the Legion of Merit for exceptionally meritorious conduct in the performance of outstanding services during the period indicated was awarded by the War Department to the following-named officer:

Colonel Arthur L. McCullough, O257728, Air Corps, Army of the United States. October 1943 to August 1944.

Respondent's Exhibit "B".

III LEGION OF MERIT.—By direction of the President, under the provisions of the act of Congress approved 20 July 1942 (sec. III, WD Bul. 40, 1942) and Executive Order 9260, 29 October 1942 (sec. I WD Bul. 54, 1942), the Legion of Merit, in the Degree of Commander, for exceptionally meritorious conduct in the performance of outstanding services during the period indicated was awarded by the War Department to the following-named officer:

Major General E. P. Nares, British Army. January to November 1944.

IV BRONZE STAR MEDAL.—1. By direction of the President, under the provisions of Executive Order 9419, 4 February 1944 (sec. II, WD Bul. 3, 1944), a Bronze Star Medal for meritorious services in connection with military operations against an enemy of the United States during the periods indicated was awarded by the War Department to the following-named officers:

Captain Harry S. Arendt, O1586411 (then first lieutenant), Air Corps, Army of the United States. 1 February to 14 August 1945.

Major Rodney A. Jones, O856859, Air Corps, Army of the United States. January 1944 to June 1945.

2. By direction of the President, under the provisions of Executive Order 9419, 4 February 1944 (sec. II, WD Bul. 3, 1944), a Bronze Star Medal for heroic achievement in connection with military operations against an enemy of the United States during the periods indicated was awarded by the War Department to the following-named officer and pharmacist mate:

Pharmacist Mate (2d Class) Cecil J. Peart, United States Navy. Peart distinguished himself by heroic achievement on 2 May 1942 while serving with Headquarters Company, 4th Marine Regiment, at Corregidor, Philippine Islands. During a heavy enemy artillery bombardment, he left a place of comparative safety to assist in rendering first aid to a group of men who had

been trapped in a culvert. By his courageous action and outstanding devotion to duty, Pharmacist Mate Peart brought great credit to himself and the United States Navy.

First Lieutenant Charles E. Preble, O1325192, Infantry, Army of the United States, performed heroic services on 26 April 1945 while serving with Headquarters Company, 91st Infantry Division, in Italy. While proceeding on a reconnaissance toward the Adige River, he disregarded sniper fire and pushed on. Upon entering the town of Angiara, he joined forces with several partisans in a firefight with the enemy. He drove on to the center of the town and apprehended 18 of the enemy. Lieutenant Preble's heroic action was typical of the highest traditions of the military service.

V AIR MEDAL.—By direction of the President, under the provisions of Executive Order 9158, 11 May 1942 (WD Bul. 25, 1942), as amended by Executive Order 9242-A, 11 September 1942 (WD Bul. 49, 1942), an Air Medal for meritorious achievement while participating in aerial flight during the periods indicated was awarded by the War Department to the following-named officers, flight officer, and enlisted men:

First Lieutenant John R. Charles, O718501, Air Corps, Army of the United States. June 1944 to March 1946.

Private First Class Myron F. Comstock (Army serial No. 37457236), Air Corps, Army of the United States. 7 May 1943 to 29 August 1945.

First Lieutenant Robert A. Deknes, O804796, Air Corps, Army of the United States. 4 February 1944 to 13 October 1945.

First Lieutenant John E. Eder, O807397, Air Corps, Army of the United States. 11 October 1943 to 16 January 1946.

Flight Officer Gordon H. Evrard (T133428), Air

Corps, Army of the United States. 29 December 1944 to 2 March 1946.

Sergeant Alexander R. Gassaway (Army serial No. 33582556), Air Corps, Army of the United States. 17 February 1944 to 19 October 1945.

VI ARMY COMMENDATION RIBBON.—By direction of the Secretary of War, under the provisions of section I, WD Circular 281, 1946, an Army Commendation Ribbon for meritorious services during the periods indicated was awarded by the War Department to the following-named officers:

Captain Horace H. Cherry, O520941, Air Corps, Army of the United States. 5 January to 7 April 1945.

Lieutenant Colonel Edward B. Kirk, O335355, General Staff Corps (Infantry), Army of the United States. November 1945 to November 1946.

Major Herman M. Klentschy, O469423, Corps of Engineers, Army of the United States. December 1945 to November 1946.

Second Lieutenant Charles A. Miller, O45867, United States Marine Corps. March to July 1946.

VII AIR MEDAL.—So much of section VI, WD General Orders 10, 1946, as pertains to Second Lieutenant Paul R. Vaughn, Air Corps, as reads "Second Lieutenant Paul R. Vaughn" is amended to read "Second Lieutenant Philip R. Vaughn."

By order of the Secretary of War:

DWIGHT D. EISENHOWER
Chief of Staff

OFFICIAL:

EDWARD F. WITSELL
Major General
The Adjutant General

RESPONDENT'S EXHIBIT C.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

Washington, 12 August, 1948

I hereby certify that the attached extract copy Special Orders No. 38, Headquarters, Port of Leghorn, United States Army, APO 512, dated 3 September 1947, is a true and exact extract copy made from official records presently in the custody of The Adjutant General's Office, Department of the Army, Washington, D. C.

EDWARD F. WITSELL
Major General, U. S. Army
The Adjutant General

I hereby certify that MAJOR GENERAL EDWARD F. WITSELL, U. S. Army, who signed the foregoing certificate, is THE ADJUTANT GENERAL, U. S. ARMY, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I Kenneth C. Royall, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 13th day of August, 1948.

Kenneth C. Royall,
Secretary of the Army.

(SEAL)

By James C. Cook,
Deputy Administrative Assistant.

Respondent's Exhibit "C".

HEADQUARTERS
PORT OF LEGHORN
UNITED STATES ARMY
APO 512

SPECIAL ORDERS NO. 38:

3 September 1947

EXTRACT

1. A general court-martial is appointed to meet at this headquarters at 0845 hours, 3 September 1947, or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT

COLONEL VIRGIL N. CORDERO, 0-7472, INF,
COLONEL JEROME F. SEARS, 0-100021, FD,
LT. COLONEL CLYDE W. WELLEN, 0-153627, INF,

Law Member,

LT COLONEL HAL F. IRWIN, 0-197769, INF,
LT. COLONEL CHARLES F. KNOBLOCH, 0-158894, INF,
LT COLONEL FRANCIS W. DAVIS, 0-273021, CAV,
LT. COLONEL JAMES C. GABRIEL, 0-220083, FA,
MAJOR ANDREW L. TUCKER, 0-151059, CMP,
MAJOR JAMES WATSON, 0-482200, CML C,
MAJOR ELMER H. BAUER, 0-43502, INF,

CAPTAIN DONALD C. YOUNG, 0-1588391, QMC,
Trial Judge Advocate,
CAPTAIN FRED L. ALIEN, 0-303893, INF,
Assistant Trial Judge Advocate,
CAPTAIN DEWEY KIEMM, 0-496809, CMP,
Assistant Trial Judge Advocate

Respondent's Exhibit "C".

1ST LIEUTENANT CLARENCE W. BURKS, 0-2039431, INF,
Defense Counsel,
CAPTAIN JOSEPH M. O'LEARY, 0-1168013, FA,
Assistant Defense Counsel.

All unarraigned cases in the hands of the Trial Judge Advocate of the General Court-Martial appointed by paragraph 1, Special Orders Number 25, this headquarters dated 29 July 1947, as amended by paragraph 1, Special Orders Number 31, this headquarters, dated 12 August 1947, may be brought to trial before this court.

BY ORDER OF COLONEL ORSINGER:

RALPH C. TILLEY
Colonel, AGD
Adjutant General

OFFICIAL:
/s/ Ralph C. Tilley
RALPH C. TILLEY
Colonel, AGD
Adjutant General
Seal--Official Copy.

RESPONDENT'S EXHIBIT D.

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

Washington, 24 August, 1948

I hereby certify that the attached is a certified true copy of a Brief, in support of Thomas A. Gusik, Private, in a hearing before a court-martial Review Board, Washington, D. C., Monday, December 15, 1947, on file in the office of The Judge Advocate General.

HUBERT D. HOOVER
Brigadier General, United States Army
Acting The Judge Advocate General

Respondent's Exhibit "D".

I hereby certify that Brigadier General Hubert D. Hoover, who signed the foregoing certificate, is the Acting Judge Advocate General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I Kenneth C. Royall, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this twenty-fourth day of August, 1948.

Kenneth C. Royall,
Secretary of the Army.
(SEAL) By James C. Cook,
Deputy Administrative Assistant.

BRIEF
IN SUPPORT OF
PRIVATE THOMAS A. GUSIK

HEARING BEFORE COURT MARTIAL REVIEW BOARD WASHINGTON, D. C., MONDAY, DECEMBER 15, 1947

In Re: THOMAS A. GUSIK, U. S. Army

STATEMENT OF THE CASE

This is a review of a most serious charge—murder, involving a mere youth only about 18 years of age. Now that the scene has shifted away from an infuriated, menacing populace and the pressure of their local public press, it is proper to ask two questions: (1) Is Thomas Gusik guilty of murder? (2) Did Thomas Gusik have a fair and impartial trial?

The specifications of murder charge that "Gusik, with **malice aforethought, wilfully, deliberately, feloniously,**

unlawfully, and with premeditation killed a human being." To prove this, it is incumbent upon the prosecution to prove every essential element of the above specifications beyond a reasonable doubt.

Before considering any evidence offered, it should be understood that Gusik was assigned to a specific duty on the night of the alleged murder; that he was on guard duty; and that the orders of the guard provided, among other things, that if anyone enters or attempts to enter the enclosure, upon failure to stop on the call of "Halt", the guard was to shoot to kill. (Sec. III, No. 1, Sub-Sec. (d) & (g) of Exhibit 1, Copy of Special Orders).

> **Sub-Sec. (d)** — Any person loitering near the fence after the hours of darkness will be fired upon after challenging.
>
> **Sub-Sec. (g)** — In case any person is in my area, I will call "Halt". If the person fails to halt, I will fire a warning shot in the air. If the person still fails to halt, I will shoot to kill.

Gusik was performing his duty on the night in question. Two Italian civilians, who were part of an organized gang of brigands and thieves, were shot after breaking in and through the fence, and two sentries from Posts 4 and 5 fire numerous shots in the same direction. That is all and the only proof in the entire record of the transcript of the proceedings. The two men who were shot and killed were in the attempt to steal U. S. Army property at the time. Private Gusik, in shooting, carried out his special orders as a soldier. He completed his tour of guard duty; was thereafter placed in arrest of quarters for two days; and was then returned to duty. After 15 days of duty, he was re-arrested and thereafter tried for murder.

EVIDENCE

The testimony of Hoagland, by which it seems the prosecution tried to prove malice and premeditation, is

false, malicious and fabricated. The court should have known that if guard mount was held at 1:00 P.M. on the 12th, Gusik could not have been with Hoagland at 7:00 P.M. that night, nor could anyone with an open mind believe that even if Gusik had the conversation as alleged by Hoagland, he certainly would not have carried it on in the presence of a witness. On cross examination of Hoagland by the defense counsel, the witness, Hoagland, admitted that he was unable to tell on what day this alleged conversation took place.

(T-Pg. 8)

Q. What day did this conversation take place?
A. I can't tell you just what day it was.
Q. Didn't you just testify it was the 12th of August?
A. Yes, sir.

No one in the prosecution, the defense, or the court, made any effort to check the post record to determine whether Hoagland and Gusik were out on pass on August 12th, nor did anyone try to learn how long, if at all, Gusik was acquainted with Hoagland, nor did anyone make any effort to obtain any testimony from Hoagland regarding the identity of the two Italians with whom he charges Gusik with having had a conversation.

(T-Pg. 8)

Q. Who was present besides you and Gusik?
A. Two Italians.

Hoagland was permitted, without objection, to testify that it was his "guess" that the Italians were to come into the post for the purpose of securing tires.

(T-Pg. 8)

Q. For what purpose were they to come in?
A. To get tires, I guess.

This answer should have been stricken as a conclusion and further, as not based on knowledge but merely guess work.

In cross examination, Hoagland was asked?

(T-Pg. 9)

Q. Then you don't know why they were going in the depot?

A. No, sir.

This further bears out that Hoagland was not testifying from knowledge.

It was upon this type of testimony which was improper and prejudicial that an 18 year old boy was charged and convicted of murder.

On Page 8 of the transcript, Hoagland was asked:

Q. After that conversation with the Italians, you remained in the presence of the accused Gusik, is that true?

A. Yes, sir.

It is contended that such question is leading and should have been stricken in that it was, in effect, the prosecutor testifying rather than the witness.

To illustrate the extent to which prosecutor was permitted to ask improper and leading questions, it should be noted that on pages 7, 8, and 9 of the transcript, there were 25 questions asked of Hoagland on direct examination, of which 13 were answered by mere "Yes sir" without objections. Of the remaining 12 questions, improper and irrelevant answers were accepted.

There is only one line in the entire transcript upon which the prosecutor attempted to prove malice, motive and premeditation:

(T-Pg. 8)

Q. What did Gusik tell you as you were coming back to camp?

A. He told me he was going to get Franco because Franco had screwed him out of a wrist watch.

This feeble attempt to rest malice, motive and premeditation on the above single line in the transcript was negated by the witness' next answer:

(T-Pg. 8)

Q. Did he say how he was going to get Franco?

A. No sir.

The matter involving the question of the wrist watch

is wholly uncorroborated and unsupported by any valid and legal testimony. It is a well established principle of law that the uncorroborated and unsupported testimony of a person in a criminal case is not sufficient to convict, particularly in a capital offense.

To further indicate that Hoagland's testimony was wholly incompetent and contradictory, we desire to submit the following testimony of Private Parker, another prosecution witness:

(T-Pg. 28).

Q. Relate to the court the substance of that conversation.

A. Well, it was sometime—I think it was in the afternoon and I saw Private Gusik—we slept in the same tent together—and I told him that I had some Italians who were to come to my post on that night as I was on Post No. 2 and I told him if he wanted me to I would send them over to his post.

The contradiction consists of the fact that Hoagland testified that Gusik had made arrangements with these two Italians to come to his, Gusik's, post and Parker testifies that the two Italians were to come to his, Parker's post.

Thus, we have premeditation, malice and motive being deduced from the testimony of a witness who did not know the date of conversation; who contradicted himself and whose testimony conflicted with other prosecution witnesses. Obviously, this witness' testimony certainly is not enough upon which premeditation, malice or motive can be based.

Much of the testimony of DiPinto Luigi, a confessed thief, never should have been admitted, especially (Page 10) because it is purely hearsay—wherein he states that arrangements were made with his brother, Franco, and the sentinel on Post 4 before they went there. If this were true, why didn't Hoagland so testify?

This testimony was given through an interpreter.

It should be noted on Page 9 of the transcript that the

prosecutor asked the question as to when the shooting took place in the following manner:

Q. That was on 13 August?

A. Yes.

That question was clearly prejudicial and objectionable as leading and for that reason should have been stricken from the record. Throughout the entire testimony of Luigi, the prosecutor was, in effect, doing the testifying and calling for merely conclusions or affirmatives by the witness. This is again illustrated on Page 10 when the prosecutor asked, without prior foundation:

Q. With whom did you go to the Engineer Depot?

A. With my brother.

Q. Franco?

A. Yes.

This question should have been stricken as clearly objectionable and leading.

(T-Pg. 10)

Q. Who else?

A. Alvaro, Siciliano, Romano, and Marcello from Marina de Pisa.

"Who else?" is objectionable for the same reasons cited above. It should be further noted that Luigi did not include the name of Moro in the list of persons who accompanied the gang that night. Later, in an attempt to amend the omission made by the witness, the prosecutor again testified in the following manner:

Q. Where there two Italians in your crowd by the names of Salvatore Montalbano and Teodoro Moro?

This question was clearly objectionable and prejudicial and should have been objected to and stricken for the same reasons above stated.

Luigi further testified on Page 10 of the transcript: "We went to get six tires as was arranged". In answer to the next question, "Arranged with whom?", Luigi answered, "With the sentinel on Post No. 4, who made the arrangements with my brother". Such answer is

obviously hearsay and prejudicial and should have been stricken.

It appears quite obvious from the transcript (T-Pg. 10) that the prosecutor was attempting to place words into the mouth of the witness to the effect that there was a pre-arranged signal. Despite his efforts to that end, the witness would not so testify. The prosecutor persisted and finally asked the objectionable question:

(T-Pg. 11)

Q. Before Franco went over to the fence, did anyone in your crowd whistle any music?

The question was properly ruled out as being leading and prejudicial. In the face of this ruling by the Law Member of the Court Martial, one of the Court Martial Board, Lt. Col. Wellen, **asked the exact** leading question and affirmance was secured thereto from the witness without any further objection:

(T-Pg. 14) **By the Court:**

Q. Was there any signal given before your brother went over to the fence, on the night of 13 August, 1947?

A. Yes, he was whistling "Angelina".

Here is a witness who apparently had no knowledge of any pre-arranged whistling signal and by virtue of the power of suggestion and the manner in which they tried to get this witness to answer in the affirmative, put words into his mouth to receive an answer satisfactory to the inquisitors. It is upon this type of forced testimony that Thomas Gusik was convicted.

The following question is objectionable as being a conclusion by the witness:

(T-Pg. 11)

Q. Where was the sentinel on Post No. 4 at that time?

A. He went towards Post No. 5 because he thought there was an inspection.

A witness' testimony as to what the accused thought, based on mere observation and opinion, should be clearly stricken from the record.

The following question is also leading and prejudicial and should have been stricken:

(T-Pg. 11)

Q. Did the sentinel give any command such as "Halt" before he fired?

A. Nothing.

The following question is leading and prejudicial and represents the prosecution's typical tactics in handling witnesses:

(T-Pg. 12)

Q. Was there anyone shot that evening?

A. No.

Q. Nobody got shot?

A. What do you mean—hit?

Q. Yes.

A. Yes—they were standing beside me—there were two dead people.

The following answer of the witness is a conclusion; is not responsive to the question; and should have been stricken:

(T-Pg. 12)

Q. Who did the shooting?

A. The shots came from Post No. 5—the first shots and they were hit by the first shots.

How could the witness know who was hit by what shots? Upon such absurd testimony as this, Private Gusik was convicted of murder.

Witness' answer to the following question is once again his own conclusion and not based on actual knowledge, and apparently—a figment of his imagination:

(T-Pg. 12)

Q. Where was the sentinel on Post No. 4 that you have identified when these first shots were fired?

A. He had gone to **Post No. 5.**

(T-Pg. 16)

Q. Had you ever been in the Engineer Depot before?

A. I? No. It was the first time.

Now, if the witness had never been at this post before,

how would he know the limits of Post No. 4 and the limits of Post No. 5, and how would he know the numbers of the posts? An absolute fabrication!

The following answer is in direct contradiction to a previous question that the witness had seen the sentinel on Post No. 4 go towards Post No. 5:

(T-Pg. 15)

Q. Was the sentinel still present at the fence when you went to the fence?

A. Yes.

The following is another example of the witness inventing facts as he went along—regardless of its effect, truthfulness or correctness:

(T-Pg. 10) **Direct examination:**

Q. What did he do before he spoke to the sentinel?

A. We were in the woods and he went over to talk to him by himself.

(T-Pg. 13) **Cross examination:**

Q. How far away were you at that time?

A. The five of us were all together.

In addition to being contradictory, the latter answer was not responsive to the question.

The following question contradicts the entire testimony on Page 10 above noted:

(T-Pg. 13)

Q. At the time your brother had the conversation at the fence, were you in the woods or were you up at the fence?

A. I was near the fence. I was near Moro. After six or seven minutes, I took off. Moro was already bleeding.

The following question calls for a conclusion by the witness and is leading and irrelevant—and should have been stricken:

(T-Pg. 15)

Q. Was your brother excited or calm when he went over to talk to the sentinel?

A. He was calm.

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The following testimony best described the witness' character, credability and veracity:

(T-Pg. 10)

Q. Had you ever gone to the Engineer Depot before for the purpose of getting property such as tires?

A. I? No.

(T-Pg. 16) **Cross-examination:**

Q. Did you at that time make this statement: "On that same night we made arrangements with three other young men who used to steal and with whom we had previously stolen". Did you make this statement that I have just read to you?

A. I said that I was present.

Upon this type of testimony, an 18 year old boy was convicted for murder. Luigi, in general, contradicts himself on several occasions. He testified that Franco had gone to the fence alone, and then later testified that the group accompanied Franco to the fence. He testified that he had never been near the depot and yet was able to make clear identification of the posts, their numbers and their respective positions and distances. He stated that Gusik had walked toward Post No. 5 before he, the witness, had approached the fence and then later testified that Gusik had remained at the fence when the group appeared thereat. It should also be noted that Luigi testified that the hole in the fence had been made with a "jack" (T-Pg. 11) and it will be shown by the testimony of Alvaro that the hole was made with pliers. (T-Pg. 19). It should be further noted that Luigi testified that Marcello had entered the depot through the hole (T-Pg. 11) while Alvaro remained outside with Luigi. Alvaro testified otherwise.

Testimony by Alvaro

The following questions were clearly leading and therefore objectionable, prejudicial, and inadmissible as proper evidence:

(T-Pg. 17)

Respondent's Exhibit "D".

Q. Did you go to the Engineer Depot at Tirrenia, Italy, on the 13th of August of this year in the early morning?

A. No, I wasn't there.

Q. Were you present when anybody got shot in the morning of 13 August of this year?

A. Yes.

Q. Wasn't that near the Engineer Depot?

A. What?

Q. Where these people were shot?

A. Yes.

Q. Who got shot?

A. Moro and Montalbano.

Note in the above stated questions that the witness merely answered "No", "Yes", "What", "Yes", "Moro" and "Montalbano"; while the prosecutor testified as to what took place, when it took place, where it took place, and the time it took place.

The witness testified in the first question above that he was **not** at the depot on the 13th of August. Therefore, how could he later testify as to the shooting which took place that morning at the depot? Apparently, the Court Martial permitted these highly improper questions in the attempt to make a case of premeditated murder when such questions were improper and never should have been allowed into the record.

The following answers are clearly hearsay. Such objectionable testimony was prejudicial and never should have been allowed:

(T-Pg. 18)

Q. For what purpose did you go to the Engineer Depot with these other Italians on that morning?

A. For what reason?

Q. Yes.

A. They asked me to come along with them. They said, "There is an American who is going to give us some tires".

The following questions are leading and suggestive of

an affirmative answer; and each was made without prior or proper foundation:

(T-Pg. 18)

Q. Was that where the shooting took place?

Q. As you approached Post No. 4 that morning, was any signal given by anyone of your group?

A. What signal?

Q. Did the sentry on Post No. 4 return any signal to Franco?

The above questions and answers were prejudicial and should have been stricken.

The reply to the following question is definitely hearsay inasmuch as it was not made in the presence of the witness who was testifying and should be ruled out:

(T-Pg. 18)

Q. Then what did Franco do?

A. Franco came back to us and told us that he has spoken to the sentinel and he is to tell the other persons at once.

The following question is leading and suggestive of the answer which the witness gave:

(T-Pg. 20)

Q. Did the sentry at any time give the command "Halt"?

It is not only objectionable but is prejudicial to allow such question and answer thereto.

The following question is another leading question and again we have the prosecutor testifying and putting words in the mouth of the witness. The witness had not testified that there was any shooting, but the prosecutor asked:

(T-Pg. 20)

Q. How long after the hole was cut was it that the sentry started firing?

A. At once. The sentry told us to enter and we entered and the shooting began at once.

The above question should have been stricken because a prior and proper foundation had not been laid and was also leading.

Respondent's Exhibit "D".

In the following statement, the witness stated he did not know where the sentry was at the time of firing:

(T-Pg. 20)

Q. Where was the sentry on Post No. 4—where was he when the firing started?

A. This I don't know.

Yet, the witness' following valueless testimony was allowed:

(T-Pg. 20)

Q. You testified that when the hole was being cut in the fence, the sentry was right there. Did the sentry leave?

A. He went toward Post No. 5.

This statement alone, ("This I don't know"), renders any prior or later testimony of this witness valuless on the question of "Who shot Whom". It is also impossible for either of the last two Italian witnesses to have had any definite or positive knowledge whatsoever as to who shot the deceased and what shot killed them.

(T-Pg. 22)

Q. Did the sentinel fire at you, do you know?

A. The sentinel fired towards everybody.

Certainly this testimony refuted any claim of malice or premeditation.

Alvaro's testimony is typical of the type of witnesses upon which the prosecution relied to convict an American boy of murder. It is doubtful whether testimony of a more conflicting nature could be found anywhere. Alvaro contradicts Luigi in that Alvaro testified that the fence had been cut with pliers rather than with a jack. He further contradicts Luigi in that he testified that he, Alvaro, was the person who entered through the fence (T-Pg. 19); whereas, Luigi had testified that Marcello entered through the fence and that Alvaro had remained outside with Luigi (T-Pg. 11). It should be further noted that Alvaro testified that his purpose and reason for going out to the depot was because he had paid 80,000 lira to a person named "Bobby" (T-Pg. 18 & 21). This testi-

mony definitely refutes that given by the other Italian thief, Luigi. As further evidence of this hodge-podge of conflict, is Alvaro's testimony that Moro and Franco approached the sentinel at Post No. 4, whereas, Luigi testified that Franco alone approached the fence at Post No. 4.

It should be noted further that Alvaro at no time was able to identify the sentry on Post No. 4 (T-Pg. 18). Alvaro ran inward to the depot and thereafter hid in one of the vehicles parked nearby from 3:00 A.M. until 2:30 P.M.

Both the testimony of Luigi and Alvaro were worthless and perjured—yet the court gave it full faith and credence for the purpose of convicting an 18 year old American boy who volunteered his services for his country. The members of the court insisted upon asking damaging questions of witnesses and yet failed to help an American soldier by asking questions which would aim to bring out the truth. No where does it appear in the transcript that the court is attempting to get at the truthful facts of the occurrence but instead it appears that they are aiding in the prosecution of the case, which takes on the picture that this boy was being persecuted.

A striking omission should also be noted in Alvaro's testimony. Alvaro testified that he hid within the depot for 11½ hours, yet neither the prosecution, defense, or court martial members showed enough interest or initiative to inquire from this thief how he managed to leave the depot without being apprehended. It is very apparent from this tragedy of errors, which was permitted by the members of the Court Martial, that an American boy was sentenced to remain for the rest of his life in an American penitentiary.

Testimony of Lt. Birmingham

The incompetence of the Officer of the Day, Lt. Birmingham, is best illustrated by his testimony wherein he did not know the location of the posts; who the guard was on Post No. 5; did not speak to the guard on Post

No. 5 (T-Pg. 24) ("I am a little confused as to the location of these posts") ; did not inspect the weapons of either of the two sentries (T-Pg. 24) ; did not make a report of the shooting nor take any statements from the interested parties (T-pg. 25) or question any of the Italian guards who were in the depot at the time. It is very apparent that the Officer of the Day, Lt. Birmingham, seemed definitely sure that Gusik was on Post No. 4 and that Gusik fired the shots, but he seemed not to know the name of the guard on Post No. 5 (T-Pg. 24) nor did he know whether Guard No. 5 fired any shots (T-Pg. 25 & 26) or questioned him about it (T-Pg. 26).

Referring to the record, the testimony of Dr. Carpio of the University of Pisa, on Page 27, indicated that more than one type of bullet entered the bodies of the two Italians:

(T-Pg. 27)

> ". . . . As regards Montalbano . . . . the diameter of the entrance hole was rather small and could be considered of a caliber between seven and eight millimeters. As regards Moro . . . . it was found that one of the wounds . . . . had been determined by the cover of a bullet so the hole was large and did not correspond to what should have been the caliber of the bullet. The outside of the slug was rather fringed and we could not identify the weapon according to the lines . . . ."

It is very apparent that no one was interested in having the services of a ballistic expert or of bringing into the court the fragments of the bullets found in the bodies, which were offered by Dr. Carpio. On the night of the shooting more than one weapon was fired. Nothing was done to ascertain from which weapon these pellets had been fired. This alone, presents a reasonable doubt as to whose weapon caused the death of the deceased man. Surely, in a murder case, the defense counsel should have

at least requested the introduction of that type of evidence and the members of the Court Martial should have insisted that this type of evidence be submitted in fairness to the defendant. In the scientific criminal investigation, such procedure is usual and indispensable.

Testimony of Parker

Reading the testimony of Parker, it is the prosecution testifying instead of Parker. Read the leading questions and note not a single objection, not even any cross-examination. A defense counsel, to perform his duty, should have pressed the witness very carefully and learned something about the reputation of the witness. Again the court failed in its duty, because Parker had a previous Court Martial record. His reputation was very shady, the C.I.D. knew it—and the court should have known it.

To illustrate that the prosecutor was testifying, rather than Parker, it should be noted that of 39 questions asked on direct examination, 20 were answered by mere "Yes, sir", or "No, sir".

Here are vivid examples of the prosecutor testifying in place of the witness:

(T-Pg. 28)

Q. Did you later learn about some shooting in which two Italians had been killed?

A. Yes, sir.

(T-Pg. 29)

Q. Did Gusik tell you what time to send the Italians to his post?

A. Yes, sir.

(T-Pg. 29)

Q. What time did he tell you to send the Italians?

A. Between 0300 and 0500 hours.

The above questions, in addition to being leading, were asked without proper and prior foundation, and these should have been stricken.

The witness' answer to the next question should have been stricken as not responsive to the question, and further—that the witness gave his own conclusion:

Respondent's Exhibit "D".

(T-Pg. 29)

Q. Did he tell you for what purpose he wanted the Italians to come to Post No. 4?

A. I am not exactly sure, sir, but I know when anyone goes to that post, it is for tires.

Upon such improper and very prejudicial evidence as this, the court returned a guilty verdict. It certainly lends to the belief that Army enlisted personnel were either instructed or coached to offer such type of answers. Note in this same regard Private Hoagland's testimony:

(T-Pg. 8)

Q. For what purpose were they to come in?

A. To get tires, **I guess.**

Can this body assume that those highly improper and prejudicial remarks were coincidental? Or is it more plausible that the prosecution exerted any and all means to attempt to make the evidence fit their theory!

The following reply to the following leading question cannot be emphasized too strongly:

(T-Pg. 29)

Q. Was there any pre-arranged signal between Franco and you and the accused Gusik?

A. I told Gusik if I sent them over there, **they** would be whistling "Angelina", and that **was the signal I used.**

(T-Pg. 29)

Q. At the time you saw Franco around eleven o'clock that night, did you send Franco to Post No. 4 at three o'clock in the morning?

A. When he came to my post, I told him if he couldn't do anything on my post, he could go over to Tom's post and work there.

Surely, that piece of testimony, by itself, is enough to refute completely the false statements of Private Hoagland to the effect that Gusik invited the thieves to his post or that Gusik set the signal.

Within Parker's words "that is the signal I used", lies the birth and origin of the signal "Angelina". Therein too, lies the basis for who invited whom to the depot.

This soldier's admission that he, Parker, invited the thieves to the depot; that he, Parker, had the "deal" with the thieves; (T-Pg. 28 . . . . I told him that I had some Italians who were to come to my post that night as I was on Post 2 and I told him if he wanted me to, I would send them over to his post); is determinative of the entire case.

This point not only disproves Hoagland's testimony but erases any possible semblance of premeditation, motive, or malice.

And, this witness the defense counsel did not cross-examine!

It should be noted there was no attempt made, either by the prosecution, defense, or court, to ascertain or bring out Parker's previous military or prison record; nor were there any inquiries as to the reason why he was presently assigned to a disciplinary training unit, otherwise known as a guardhouse.

Testimony by Zahurones

The questioning of Zahurones, Guard No. 5, by the prosecution and by the court, afford an excellent example of the prosecution and court placing words in the witness's mouth.

On T-Page 31, Zahurones testified that he heard a tune whistled. The prosecutor then asked:

(T-Pg. 31)

Q. Whistled "Angelina"?

A. Yes, sir.

A few questions later the prosecutor inquired:

(T-pg. 31)

Q. So it sounded like two people whistling "Angelina"?

A. Yes, sir.

The above questions, leading and prejudicial, should have been stricken from the record.

As though that were not enough, the court started a systematic series of leading questions which indicated

they were not interested in finding the truth — but rather in fitting the evidence to meet the charges and specifications.

Note that in addition to the leading features of the questions of the court — there was no foundation from the witness' prior testimony to support such questions:

(T-Pg. 34)

Q. Did the accused walk up to you and start firing?

Q. He shot at the fence and then walked up to you?

(T-Pg. 33)

Q. You fired high?

After the court directed leading questions to the witness, Zahurones, and placed words into the mouth of the witness concerning the angle of shots, the court, the prosecution, and the defense counsel failed to make any effort to determine why Zahurones fired at all inasmuch as he previously testified that he did not hear the accused shout "Halt"; whether or not he saw anyone in the compound; and whether or not he or others were fired upon. The court should have inquired and found out if there were any shots fired in the direction of the depot from the outside.

The testimony of Private Zahurones **clearly indicates** that he was firing in the same direction as, **and simultaneously with,** the accused. This is illustrated by his following replies (despite the court's high ranking officers leading questions to the contrary):

(T-Pg. 32)

Q. In which direction?

A. Up toward the woods.

Q. In which direction was Gusik firing?

A. I believe he was firing toward the woods too.

Q. Did you see or hear anything out in the direction that you fired?

A. Over the fence I heard the woods crash. I was shooting out that way through the trees.

(T-Pg. 33)

Q. Where was he firing?

A. Toward the fence.

(T-Pg. 34)

Q. You say you fired in the direction of the woods and the accused fired in the direction of the fence. Where is the woods in relation to the fence?

A. It is right on the outside of the fence.

Q. Then in the direction you were firing, you were also firing in the direction of the fence?

A. Yes, sir, that is right.

(T-Pg. 36)

Q. Did you start firing simultaneously with the accused or did you start after he stopped?

A. We were both shooting at the same time.

Q. Were you firing perpendicular or parallel to the fence?

A. Right straight toward the fence and above the fence.

Q. Had you been firing in the direction where these bodies were found?

A. Yes, sir.

Despite the above answers; despite the fact the witness said he was firing from the hip, a person no less than the President of the Court, Colonel Sears, using his position and rank, testified:

(T-Pg. 33)

Q. You fired high?

A. Yes, sir.

Certainly such a question was without foundation; certainly such a question was prejudicial; certainly it represented misconduct and bias on the part of a high ranking member of the Court; and most certainly ought to have been stricken.

What made this court constantly shy away from the witness' several assertions that he fired in the same direction? Is this the tempo of a fair-minded court?

Testimony of Urdinarrain

Here again is the prosecution testifying and the witness merely affirming. Of 15 questions asked of the C.

I.D. agent on direct examination, one was as to his identity, and 11 of the remaining 14 questions were answered "Yes sir" or "No sir". It should be evident that every question asked was leading and should have been stricken.

The most glaring omission of fact is whether the C.I.D. informed the accused of his rights under the 24th Article of War upon occasion of the very first questioning; and how long and under what circumstances the statement was taken.

Further, the agent testified:

(T-Pg. 37)

Q. What did you tell him?

A. I read off the 24th Article of War from the paragraph on the statement form **and if I am not mistaken,** I also read the 24th Article of War out of the manual.

Surely the court must have been (or should have been) familiar with the Articles of War which required the reading of the 24th Article of War **from the manual,** together with an explanation. Note how the agent testified. He did not testify **positively** that he read the 24th Article of War from the manual. No, he hurried his guess to cover his obvious violation of the Articles of War. Based on the above alone, the statement should have been rejected. It should be further noted that the 24th Article of War is not completely quoted on the statement sheet; that a paragraph is merely mimeographed on said sheets.

Because defense counsel failed to consult with the defendant concerning the taking of this statement; and/or because he did not cross-examine the C.I.D. agent, the circumstances under which the statement was taken was not brought out. This statement, Prosecution Exhibit 5, should not have been admitted into the record. (In this regard — it is urged upon the court to read the accused's statement obtained by this committee upon interview — Pgs. 18-24, et sequi).

The court's attention is specifically called to that portion of the statement which states: (Exhibit 5):

Respondent's Exhibit "D".

> "I was shown a statement given by William H. Hoagland . . . and confirmed the same on every detail, except the part where I said I'll get Franco".

Note further the accused's statement that he had **refused entrance** to the Italians; that a shot had been fired upon him; that he had shouted "Halt" and then fired.

It should be noted how "cutely" any reference to others shooting at the thieves was omitted from the statement. Should not this omission have aroused the suspicion of the court?

The following sentence, in view of all the testimony heard, should have been the "que" to the court as to whether this was a voluntary statement of the accused's or one dictated by the C.I.D. in the C.I.D.'s words:

> "I am positive that the shots fired from my gun killed the two Italians, because I was the closer one to them, and the first one to fire".

The impossibility of such a statement is obvious.

It is the contention of the defense, in this appeal, that Gusik was justified in shooting upon the thieves, and that even if his bullets killed them (which was not proved anywhere), he could not know positively that such was the case.

Surely, it is immediately visible to all that such a statement is not that of the defendant's but rather that of the C.I.D. agent.

Why the court didn't show the same anxiety and zeal toward probing the agent for the full truth as they did in attempting to get Pvt. Zahurones to say he fired high — is an unanswered question. Surely, the above was more obvious.

SUMMATION

In summation, the testimony fails to show **premeditation, malice, unlawfulness anywhere** in the transcript.

Surely, it was not found in Hoagland's testimony — for his testimony was contradicted by Parker. Certainly it couldn't be found in the befuddled contradictary testimony of the two Italian witnesses—both of whom testified they never spoke to the accused before, during, or after the shooting. The Officer of the Day's testimony did not furnish anything toward guilt. The testimony of Parker should have been basis enough to indicate that there was no malice, premeditation or motive toward murder—Pvt Zahurones' testimony does not provide the essentials of murder—but to the contrary, disproves that even Gusik killed the thieves. Gusik's statement (though illegal and improper) certainly resolves **against** any conclusion of malice, motive or premeditation.

Where in the evidence is the proof of the essentials of murder?

As was stated earlier in this brief — it seems to rest upon one line in Hoagland's testimony — and that one line was completely refuted by Parker and others.

The principle that "all reasonable doubt resolves to the accused" seems never to have been a part, parcel, or factor in this case.

It is the contention of the defense, in this brief, that had Gusik been permitted to testify, he would have stated the following facts, in substance, as outlined hereinafter:

> The following report is submitted by the Interviewing Sub-Committee of the Joint Veterans Commission Legal Committee concerning the interview of said Sub-Committee with Pvt. Thomas A. Gusik on November 23rd, 1947, at the U. S. Army Disciplinary Barracks, Greenhaven, New York.
>
> The following members of the committee were present during the entire interview: Chester J. Koch, Joseph Horwitz, Leo G. Chimo, Francis Picklow, and Berrard B. Direnfeld. Also present throughout the entire interview was Capt. Stephen S. Bienicek, Post Judge Advocate, representing the U. S. Army at the Greenhaven Disciplinary Barracks.

Respondent's Exhibit "D".

I. GUSIK'S MILITARY RECORD

Pvt. Gusik enlisted in the U. S. Army on July 19, 1946, from Cleveland, Ohio. He received his basic training at Fort Bliss, Texas; and was later assigned to duty with the 82nd Airborne Division at Fort Bragg, North Carolina. On December 15, 1946, Gusik was shipped overseas and arrived at Leghorn, Italy, on December 26, 1946. On December 28th he was transferred to the 417th Field Artillery and on March 7th, 1947, was assigned to the 7156th Engineers Guard Co. at Tirrenia, Italy.

Pvt. Gusik served as a guard in the Army Supply Depot at Tirrenia, and was so engaged at the time of the shooting incident.

II. FRANCO

Working in the depot were many Italian civilians, among whom was one named Franco, whose special duty had been that of a switchboard operator. Also engaged at the depot was an Italian Army Unit, (14th or 16th M.P. Co.) which correlated its guard activities with the American Army Unit.

This Italian civilian, Franco, had on occasions, previous to this court martial incident, been arrested and confined at the post guard house at least six or seven times for black market activities. Pvt. Gusik stated that a Sgt. O'Conner, of the same company could testify that Franco had been arrested many times for his illegal activities on the post during the night season; that on most of these occasions Franco had been turned over to the Italian authorities; and on a few occasions had been fined 5,000 Lira (the equivalent of $10.00), and had been released each time. His reputation both with the Army and the Civilian authorities was that of a black marketeer. He had also worked for the Italian Officer, who commanded the Italian depot guards.

Respondent's Exhibit "D".

III. PVT. PARKER

Pvt. Ursel B. Parker had, prior to joining the 7156th Guard Co., been convicted and sentenced on a charge of A.W.O.L. This sentence was one of six months' confinement and forfeiture of 2/3rds of his pay. Upon release from an Army Disciplinary Barracks in Italy, Parker joined Thomas Gusik's unit in June, 1947; was placed in the same tent with Gusik, with a bunk directly across from him. Parker had a reputation for being a black marketeer in dealings with Italian civilians. Two American soldiers, Charles Hoy and Robert Freeles, were associated with him in his black market activities.

The Robert Freeles mentioned above was the "Bobby" referred to by the Italian witness, Alvaro, as the soldier who was paid 80,000 Lira. The soldier, Charles Hoy, mentioned above, is the soldier who joined Parker in going A.W.O.L. shortly after the shooting of the night of August 12-13, 1947. The latter soldiers were A.W.O.L. for 12 to 15 days and were returned to their post, from Trieste, by military authorities.

Parker, a confessed black marketeer, had admitted having several dealing with Franco, and had admitted allowing Franco on to the post; and for such activities (including the incident of August 12-13), was court-martialed and received a sentence of six months' confinement and forfeiture of 2/3rds of his pay. Parker's sentence was subsequently suspended.

Provost Sgt. Tucker found 80,000 Lira on the person of a soldier named Frichal, a friend of Parker's. Parker had told Gusik that he, Parker, had 11,000,000 Lira hidden in Pisa, Italy. Another soldier friend of Parker's, Alderman, was reported to have had 850,000 Lira.

Respondent's Exhibit "D".

IV. DESCRIPTION OF AREA

Presented herewith, on Page 19A, is a sketch of the areas as furnished by Pvt. Thomas Gusik.

The depot enclosure was fenced in with regular chicken wire. Along the chicken wire, six inches apart, was strung barbed wire. About 10 yards apart were placed 20 foot high light poles. The light reflectors were pointed downward and toward the enclosure. Signs were posted on the outside in three languages (English, German, Italian) that unauthorized persons would be fired upon. There were three rows of vehicles parked parallel with and back from the inside of the fence. There was then an interval of space and another row of vehicles; another interval of space and a third row of vehicles. The Special orders of this Post provided that persons outside the fence should be challenged and then fired upon; persons inside of the post the call "Halt" shall be made, a warning shot fired and then "shoot to kill."

V. EVENTS PRECEDING SHOOTING INCIDENT

During the afternoon of August 11, 1947, Parker approached Thomas Gusik and told the latter that if he, Gusik, saw Franco while in town that night, Gusik should tell him that Parker would be on duty at Post No. 2 at 11:00 P.M. on August 12, 1947, and that Parker wanted to see him at that time.

Thomas Gusik went on pass to Tirrenia on August 11, 1947, at about 1800 hours. He left the depot by himself. On the way he met Pvt. Hoagland, a member of his unit, and together they had a meal at a restaurant and later saw a movie. While walking in front of a Tirrenia Hotel, at about 1900 hours Thomas Gusik, seeing Moro, a friend of Franco's, across the street, left Hoagland, walked to where

Moro was and gave him Parker's instructions to relay to Franco. Moro said that he would relay the message and instructed Thomas Gusik to tell Parker that the signal would be the tune "Angelina". Leaving Moro, Thomas Gusik returned to where Hoagland was and together they returned to camp.

Gusik denies having had any conversation with Hoagland concerning "getting even" with Franco. Gusik further denied that he had ever mentioned anything about a wrist watch.

At 6:30 A.M. revellie the next morning, August 12, 1947, Thomas Gusik told Parker what had occurred. Parker replied that it was "O.K." and that he, Parker, had already seen Franco himself on the evening preceding. He said that he had arranged to allow Franco to come onto Post No. 2 for the purpose of obtaining blasting equipment. Parker then asked Gusik whether or not the latter would allow Franco to enter his post and Gusik's answer was, "I don't know, I don't think so". On the night of August 12-13, 1947, between 11:00 P.M. and 1:00 A.M., Franco and his men had come to Parker's post as pre-arranged, for the purpose of stealing blasting equipment, fuses, etc. Parker admitted that the thieves had made a hole in the fence on his post and were inside the depot — but that they had not completed their illegal mission because the Officer of the Day was approaching the post on his inspection check. The hole through which Franco had gained admission was found and blocked up. Someone in authority, believed to be the Corporal of the Guard, under the direction of the Officer of the Day, blocked this hole in the fence and did nothing further about it.

Parker later told Gusik that when Gusik went on to his guard turn at Post No. 4, at 0300, that he "had better whistle "Angelina" or else he might get a slug in his head".

Thomas Gusik, not wanting any trouble with Parker, did not say yes or no. Parker had always used the signal "Angelina" in his illegal dealings with Franco. Franco had a reputation of being armed with a .22 or .25 caliber pistol and upon one occasion was known to have made the threat that he will kill a certain Sgt. Slater who had once refused Franco admittance onto the post.

VI. SHOOTING INCIDENT

Thomas Gusik, shortly after 0300 of August 13, 1947, while walking his No. 4 post, counter clockwise along the inside of the fence, heard someone whistling "Angelina". He returned the signal by also whistling the same tune. Franco, alone, came out of the woods and while standing outside of the fence, told Thomas Gusik that Parker said it was O.K. to let him in. Thomas Gusik, in order to avoid firing Franco, whose reputation he knew, told him that he could not let him in because the Officer of the Day was coming. Franco, mumbling his displeasure, departed into the direction of the woods. When Franco left, Gusik was under the impression that he was leaving for good and had no idea, that he, with others, would return. Thomas Gusik turned his back on the departing Franco and continued to walk his post, counter clock-wise, going in the direction of Post No. 5 (see diagram on Page 19A). After going about 10 or 15 yards a shot whizzed by him causing him to hit the ground and roll under a stone crusher for protection. This stone crusher was located at the end of the first row of vehicles. (See description of area on Page 19A). Preparing his carbine for action, he awaited developments there for three or four minutes.

Thomas Gusik heard a hole being cut in the fence and soon thereafter saw individuals inside the en-

closure. Since two of the lamps were out, it was difficult to see who was cutting the fence or who was coming through the fence or how many persons were involved. His guess was that there were from five to seven persons present at that time at the fence. He did not see any weapons on them but was certain that they were carrying something – which was later determined to be two wrenches and a jack; tools of tire thieves. These tools were later found within the enclosure.

Thomas Gusik hollered halt twice and when some of the Italians started to run inward to the depot he opened fire. His carbine jammed sometime during the firing of the first clip. When his weapon wouldn't fire, and while he was engaged in ejecting a shell so that his weapon would be put into shooting order again, he heard the guard on Post No. 5 firing an automatic weapon, and also heard the firing of the two Italian guards, who had heavy rifles. When he removed the jammed clip and placed a new one in his carbine, he also resumed his firing and also fired one clip in the air to attract attention of the other guards.

After the shooting stopped, Gusik saw that Guard No. 5 had been firing from a position of about 15 to 20 feet to the right of Gusik; and that both had been firing in the same general direction. The nearest of the Italian guards was at a point between and behind Gusik and Guard No. 5. He too was firing in the same general direction (See diagram on Page 19A).

At the completion of the shooting, Gusik heard groans coming from the area where the Italians had been. Gusik believes he fired all three clips, using one of them to attract the attention of the other depot guards.

Respondent's Exhibit "D".

VII. INCIDENTS SUBSEQUENT TO SHOOTING INCIDENT

After the firing started, Gusik saw one of the Italians run toward the vehicles inside the depot. Parker later told Gusik that one of the Italians, Alvaro, had remained hidden in one of the depot vehicles from 0330 to 1430 of August 13, 1947; that this Italian had allegedly paid one of the Italian guards 20,000 Lira to let him escape out of the depot unnoticed.

Approximately 10 minutes after the firing had ceased, the Corporal of the Guard, Sgt. Sopko, and soon thereafter, Sgt. Gagnon, with the Officer of the Day, Sgt. Sopko and Thomas Gusik, went to the area where the civilians had been. They found two bodies lying in the irrigation ditch outside the enclosure. One of the Italians was lying on his face and the other on his back. One was dead and the other badly wounded. The wounded civilian was taken to the hospital but died on the way. Verification is had as to this by guards of the 90th M.P. Co. who had stopped the vehicle on the way.

Thomas Gusik was allowed to finish his guard turn, being relieved at 0500 hours. He continued to be a member of the guard, performing his 0900 to 1100 guard duty. Thomas Gusik finished his guard tour with the carbine used in the firing. Both he and the guard on Post No. 5 cleaned their carbines at the conclusion of their guard tour at 11:00 A.M.; and then turned their weapons into the supply room.

At the time Gusik finished his 0300-0500 guard shift, the Officer of the Day instructed Gusik to write out a report of the shooting incident in his own hand-writing; which Gusik did. Following his 0900-1100 guard shift, the Officer of the Day instructed Gusik to take his handwritten statement to

the personnel section and there Sgt. Bievu type it out. Both the handwritten statement and the typewritten statement were left with 1st Sgt. Wedell for their records, and Gusik never saw the statement again. At the time Gusik made his handwritten statement at 0500, the O.D. read the 24th Article of War to him quickly and hurriedly. Gusik did not understand it.

Gusik subsequently discussed the shooting incident with other members of his unit. These in particular to whom he talked with were: Parker, Hoagland, Zahurones, Weaver, Martines, Zevesky, Yurich and others.

Gusik was in arrest of quarters for two days under instructions that this was for his own benefit. After these two days of arrest in quarters, he was returned to duty. Provost Sgt. Tuck, speaking for those in command, told Gusik that the matter had been determined as one of "justifiable homicide".

Gusik stated that after the shooting, Parker had gone to town and talked to the Italians involved in this incident. Upon his return, Parker informed Gusik that Luigi, one of the Italian civilians involved (and brother of Franco), would report to the Criminal Investigation Division that Gusik had had a "deal" with Franco.

After the shooting incident, Thomas Gusik did not leave the depot area because the Italians were awaiting him by the railroad tracks near the depot area and had sent threats of bodily harm.

VIII. INVESTIGATING OFFICER

The Investigating Officer who served Thomas Gusik with a copy of the charges at the guardhouse, read the charges listed against him and also read the statements of the persons whose evidence was to be used against Lt. Birmingham, Parker, Zahurones, Urdinarrian, and two Italian Guards.

Respondent's Exhibit "D".

Hoagland, in his court martial testimony, said that he and Gusik were on pass at 1900 hours of August 12, 1947. This, Thomas Gusik denies on the basis of his guard duty at that time. His guard duty of 24 hours commended with guard mount at 1300 hours of August 12, 1947, and continued 1300 hours of August 13th, 1947. His actual guard turns were from 1500-1700, 2100-2300, 0300-0500 and 0900-1100. At no time during this guard duty did he leave the depot.

Gusik denies that Hoagland was placed so as to overhear his conversation with the Italian civilian, Moro, with whom he talked in front of the Tirrenia Hotel. Gusik denies that he ever said he was going to get Franco because he "screwed him out of a wrist watch" or any such similar remarks. Just why Hoagland testified as he did in these two incorrect particulars, is unknown to Gusik. He advised his defense counsel as to this, at trial, but no action was taken as to his request for cross-examination in this regard. Gusik also stated that he had not ever had any dealings with Franco whatsoever.

The guard on Post 5 had previously said that he saw the position of the two Italian guards, at the time of the shooting. These two Italian guards signed statements to the effect that the Italian civilians had fired a shot into the depot and that they and Gusik had returned the fire. The signed statements, which were read to Gusik by the Investigating Officer, were not introduced at the trial. These two witnesses, who were originally listed on the charge sheet as witnesses for the prosecutor, were not called to testify at the trial.

Zahurones, in his signed statement to C.I.D. investigators, said that the Italian civilians had fired upon the guards. In his court martial testimony, this soldier did not mention that a shot had been fired by the Italian civilians. Zahurones' statement

as read to Gusik by the investigating officer, stated that Zahurones, Guard No. 5, had fired into the grass at objects moving. At trial, this soldier testified that he fired parallel with the fence; and then later, testified that he fired in the air. The above was called to the defense counsel's attention at trial by Gusik, but nothing further was done by the defense counsel.

IX. C.I.D. INVESTIGATION

Provost Sgt. Tuck, on August 31, 1947, asked Thomas Gusik for a statement of the incident. When Gusik told him that he had already made a statement of the incident (August 13, 0500) the Provost Sgt. told him to make a second one. Gusik, in the presence of Sgt. Tuck and his Commanding Officer, related the incident to them. As Gusik told of the incident, the Commanding Officer wrote it down. Gusik told him of the previous statement made, but he was told that "we got to have another statement". Gusik signed the handwritten copy of the statement of the C.O., and later signed the typewritten copy of said statement. He does not know what happened to those statements.

Gusik does not believe that the 24th Article of War was read to him at this time, but is sure that it was not explained to him, as he still did not understand its purport.

Gusik was arrested by the C.I.D. on August 31, 1947, after 15 days of continuous duty, and was thereafter interrogated approximately 24 times by the C.I.D. prior to the making of his final statement. On September 25, 1947, he was taken to the CID headquarters and three CID agents interrogated him. A Lt. Strano, a CID agent, Urdinarrian, and another, whose name Gusik cannot recall, questioned, argued, and placed him in fear by "throwing

murder" at him by way of reading the maximum penalty of murder to him, and of talking about the "rope". Gusik stated that he was scared.

Thereafter, they told him, in effect, that if he made a statement it would go easier with him. The statement was taken in this manner: Gusik would relate a detail of the incident; Lt. Strano would dictate his version of what Gusik had said; Urdinarrian, in turn would write down the Lieutenant's version. This went on through the entire statement.

Following its completion, the statement, written by Urdinarrian, was taken to a secretary who typed it out. According to Gusik, the statement he related would cover about a page — but that the Lieutenant, in transcribing it, lengthened it to more than 2½ pages. Gusik objected strenuously to certain portions of the statement but the CID agents would argue with him that the way they had it in the statements was the way it must have been. Finally, after reading the typed statement, Gusik came to the conclusion that it was useless to object to it further and signed it.

There were two portions of the statement, among others, that Gusik objected to — even at the time of signing. One dealt with the part that stated he had previous dealings with Franco. The CID agents asked him if he had ever seen Franco on the post before, and Gusik replied that he had seen Franco on one occasion (while on guard duty) walking about with the Italian Lieutenant who was in charge of the guards. The CID agents told Gusik that if he saw Franco on his post at any time—that he must have had a "deal" with him. Gusik said he didn't know how Franco came there, or what his purpose was in being there. Yet, the CID agents insisted that the remarks about having previous dealings remain in the statement.

Another portion of the statement Gusik objected to at the time of signing, was the statement that he, Gusik, was positive that the bullets from his gun killed the Italian civilians.

The CID agents asked Gusik if he was the first to open fire. Upon replying that he was the first to fire, the agents told him that the bullets from his gun, therefore, must have killed the Italians. This, despite the fact that Gusik insisted that he didn't know whose bullets killed the Italians, as there were four men firing at the same. (Gusik, Guard No. 5, and the two Italian guards).

At no time was the 24th Article of War read to him. At no time was it explained to him. At no time, was he told that he had the right to make a statement or not, as he saw fit. The agents asked Gusik if he had had the 24th Article of War read to him, and when he said he had it read to him on the occasion of making his first statement at 0500 on August 13th, the agents did not read it to him. At the time of the signing of the statement, agent Urdinarrian was not present in the room—only the Lt. Strano was present.

X. DEFENSE COUNSEL

The Investigation Officer, during his visit to Gusik at the guardhouse, asked him whom he wanted as his defense counsel. Gusik told him he desired a Lt. A. B. (Radar) Ryan of the 88th Infantry Division, who Gusik knew to be a lawyer in civilian life, and an officer whom he had met in the U. S. and knew had shipped to Italy.

Gusik had no idea as to who his defense counsel would be until two days before his court martial, at which time a Lt. Burk came to the guardhouse to see him. This was on October 7, 1947. At that time, Lt. Burk told him that they could not get Lt.

Ryan as defense counsel as many officers had been transferred to Germany, and it was believed that Lt. Ryan was one of them, but didn't know for sure. Burk told Gusik that he had been appointed to defend him. By this time, Gusik was of the opinion it would not do him any good to ask for anyone else, so he consented to Lt. Burk as his defense counsel. Lt. Burk Burk told him that the trial would be held on October 9, 1947. This one and only visit and conversation by the defense counsel with Gusik lasted about 10 minutes, and was Gusik's only contact with his counsel before trial.

The defense counsel did not ask Gusik how he would plead; nor did he ask Gusik for an account of what happened; nor did he ask of any of the facts; nor did he ask for the names of any possible witnesses in defense. He merely read the charge sheet to Gusik and said he'd see him in court on day of trial.

The defense counsel was a man of about 28 years, but Gusik did not know whether he was an attorney in civilian life. Gusik stated that he did not know that he had a right to call witnesses in his own behalf, else he would have called some witnesses.

Gusik's expressed opinion of the value of his counsel was that he did nothing for him. He especially requested his defense counsel to question Hoagland about his testimony; to attack the character and credibility of Parker, and the untruthfulness of Parker's testimony. The defense counsel asked no questions of Parker at trial. Gusik asked his counsel to question the Italian witnesses as to the discrepancies of their testimony, and the contradictions from their original statements. Gusik asked that CID agent, Urdinaarian, be questioned about his having been present at the time of the signing of the statement as testified; and also as to the disput-

ed and objected parts of the statement. Counsel always assured Gusik that it was not necessary, or that it would be O.K.

The defense counsel advised Gusik against taking the stand and gave as his reason that if he did, that he would be convicted of murder. The defense counsel also told him it would not do him any good to take the stand. He also told him the same thing during the trial in answer to Gusik's request for questioning or objection.

After the verdict, the defense counsel patted Gusik on the back and told him that he was lucky. Before the trial, his defense counsel had told him he had a pretty good chance to go free and further stated he would get away O.K.

The two Italian witnesses who were originally listed as witnesses for the prosecution were not called. Gusik mentioned this to his defense counsel, but the latter did nothing to get them to testify, or to comment on their absence. Gusik informed his counsel that these men had signed statements that a shot had been fired into the depot before the shooting, and that both men had returned fire also.

Gusik's two previous statements of August 13th and August 31st were not introduced at trial; nor does he know what happened to them.

Zahurones' original statement to the CID, wherein he stated he had fired into the grass, was not introduced to contradict his testimony from the stand that he had fired high.

XI. GENERAL

Gusik stated that he never made any gains from, nor even took part in, any black market activities. He has no personal property in present account at the Disciplinary Barracks except 165 lira. Appearing in several lineups at the CID headquarters, he was not picked out by anyone.

Gusik, in specific reply to the question as to why he fired, stated: "A shot was fired at me; my job was to protect government property; I hollered halt and they started to run".

Franco was never seen or found after the shooting incident.

LAW AND ARGUMENT

The following citation appears in the Digest of Opinions, Judge Advocate General 1930 p. 1284 and 1940 p. 395:

> "The admission of incompetent testimony will not necessarily prejudice the substantial rights of the accused, if, disregarding the illegal testimony, enough legal evidence remains to support a conviction. But, in such case the legal evidence must be sufficient to substantially compel a conviction, for then and then only, can the posecutor say that the rights of the accused were not prejudiced by the illegal testimony."

It is the believe of the defense that there was not sufficient legal evidence to convict Thomas Gusik of murder. Firstly, there is no definite or direct evidence tending to show that it was the bullet fired from Gusik's rifle that killed the two Italian civilians. The evidence is clear that there were two bullet wounds in the bodies of the deceased men of different caliber and shape. It is quite possible that the bullet wound from the rifle of the other person might have caused instantaneous death and that the bullet wound from Gusik's rifle might have come as an aftermath. The fact that Professor Ideale Del Carpio of Pisa University offered the pieces which were in the Institute of Pisa and had kept them for the disposal of the authorities, and that definite testimony was refused by the court martial, is an indication that they disregarded such testimony as would indicate that the bullet from Gusik's rifle did not instantaneously kill the deceased persons.

Respondent's Exhibit "D".

Further, the evidence fails to prove beyond a reasonable doubt the necessary elements for the conviction under the 92nd Article of War, namely the following: Malice of forethought, wilfulness, deliberate, feloniously, unlawfully, and with premeditation, killed the two Italians. Furthermore, with regards the element of motive, the only testimony introduced by the prosecution, was Pvt. Hoagland's to the effect that Gusik was "going to get Franco because Franco had screwed him out of a wrist watch". This testimony is contradicted by the statement of Gusik in that Gusik not only never made the statement to Hoagland, as quoted above, but at no time had any dealing with Franco regarding a wrist watch; or any other property. Hoagland, in direct examination, was unable to say how Gusik was going to get even with Franco.

Furthermore, in the signed statement to the CID, no mention is made of Gusik's threat to Franco. The record will further show that the prosecution's own witness, Pvt. Parker, testified that it was he who had made the pre-arrangements for Gusik to meet Franco, thereby, disproving any threat or pre-arrangement on the part of Gusik, or motive by Gusik to "get even with Franco".

It has been pointed out to the court the substantial amount of hearsay testimony which was introduced at the trial. Although it is recognized by the Judge Advocate General, Digest of Opinions JAG 1930 P. 1300 and 1940 P. 395, that although hearsay testimony alone will not necessitate disproval of a conviction, that is true only if there was other **sufficient competent** evidence remaining to substantially compel a conviction. For the reasons above stated, it is our contention that there has been a lack of sufficient evidence to compel conviction and, therefore, admission of the hearsay testimony is prejudicial to the accused.

We wish to point out further that the defense counsel failed in his duties as required by law, in failing to invoke the necessary defenses which would acquit the accused,

and by his failure to abstain from any personal opinion which would prejudice the guilt of innocence of the accused (Digest JAG of Opinions 1912 p. 505).

The defense counsel held a ten minute interview with the accused two days prior to the trial. The defense counsel failed to obtain from the accused his complete story of the case; failed to ascertain the names and organizations of witnesses favorable to the accused; failed to obtain any documentary evidence for the accused; failed to assist or advise him on facts which would be helpful to the preparation of the case. Furthermore, the defense counsel failed to explain the meaning of the plea of guilty, and his right to introduce evidence after the plea; his right to testify as a witness; or his rights to any other defenses available in his defense.

During the trial, on numerous occasions the accused requested his counsel to enter objections to portions of the testimony, but the defense counsel refused to enter these objections. No where does it appear that defense counsel made a study of the offense, the essential elements of proof for conviction, the expected testimony by the prosecution, or in any way, ascertain whether the evidence would necessarily convict the accused.

It is readily apparent from the reading of the record that most of the entire transcript of the testimony has failed to comply with the rules and introduction of evidence as is obtained in the Federal Courts.

> (U.S. Army 1928 corrected to April 20, 1943, Page 109, Section III) ". . . .So far as is otherwise prescribed in this manual or by Act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the U.S. will be applied by Court Martial. . . ."

This is definitely an indication that Gusik did not receive a fair and imprtial trial on the charge of murder.

The accused was denied the right to a competent, legally trained defense counsel of his own choosing, for the following and other reasons:

(A) The military training routine and discipline of the accused in his youthful immaturity, made him amenable to blind assent of any arrangements in his behalf, such as the appointment of a defense counsel.

(B) The presence of two ranking officers—Captains for the prosecution and only one Lieutenant for the defense, denote that the weight of authority rested against the accused.

(C) The failure of the defense counsel, as viewed from the copy of the record, to present any defense, either technical, procedural, or evidencial, made the defense counsel of record as good as no defense counsel at all.

(D) "There is no fixed number of Assistant Defense Counsels or Assistant Trial Judge Advocates. By studying MCM VI, you will discover that an appointing authority must detail a Trial Judge Advocate and a Defense Counsel for each general or special court martial, and when necessary, appoint one or more Assistant Trial Judge Advocates and Assistant Defense Counsels for each general Court martial. Further, the same paragraph provides that as many Assistant Defense Counsels as Assistant Trial Judge Advocates be appointed". ("The Soldier and the Law" by John A. McComsey, Col., CAC, and Morris O. Edwards, Lt. Col., Inf. revised and enlarged by Charles E. Cheever, Col. JAGD). In this particular instance, there were three trial Judge Advoctes appointed and only two Defense Counsels, while two Trial Judge Advocates served and only one Defense Counsel served. This constitutes a violation of an essential right.

If Gusik had taken the stand, the following facts would have been revealed: That his "confession" was obtained under a promise of reward and it is a well-known fact of law, that such confessions are inadmissible and are prejudicial to the accused. Furthermore, unless prose-

cution had sufficient evidence beyond the confession to compel conviction, introduction of the inadmissible confession, therefore, was highly prejudicial to the accused and insufficient to obtain a conviction.

Gusik had stated that two Italian guards employed at the depot, were listed as witnesses on the charge sheet by the prosecution and were deliberately not called to testify. Gusik stated that these witnesses, by their sworn written statements, would testify that Gusik was fired upon first before returning his fire, and that the Italian guards joined in returning the fire. Gusik would also have testified that a written statement, prepared by Pvt. Zahurones, was not introduced at the trial. This sworn statement would have shown that Pvt. Zahurones was firing at the grass and directly where the thieves were breaking in. Although Zahurones later admitted this, it is pointed out that the Court had repeatedly attempted to have Pvt. Zahurones contradict this fact.

Gusik would further have testified that he had prepared his own written statement of the shooting immediately after the incident, and although this statement was later typed out by the Personnel Section, it was not introduced at the trial. It is our contention that had this statement been introduced, it would more clearly have presented the actual facts of the shooting, than the signed "confession" which was introduced at the trial.

According to Article of War 70: "No charge will be referred to a general court martial until after a thorough and impartial investigation thereof shall have been made". This investigation is mandatory. Such an impartial and thorough investigation was not made for the following reasons:

A. The especial failure of all concerned to secure comparison microscopic examination of test firing from the weapons of those on the scene and the expended cartridge slugs. The copy of the record shows that such a slug had been removed from one of the bodies by the medical examiner and was still in his possession at the

time of the trial. This is of the greatest importance—as the guard on Post No. 5 admitted in his testimony to have fired about 30 rounds and his firing may have been the cause of the deaths. This left open a reasonable doubt as to the one responsible for the deaths.

B. The copy of the record of the trial indicates a complete lack of a scientific criminal investigation.

C. The record of the trial does not indicate that any opportunity was given the accused to cross examine the witnesses against him during the course of the investigation.

It is very apparent from the record that there has been a non-compliance with Article of War 70—referring to the taking of statements providing for a thorough and impartial investigation. Such failure to comply with this basic and important provision is an indication that undue influence was used to obtain a statement from the accused.

Here we have an 18 year old boy who insisted that he did not commit a murder and who was asked to sign a statement as contained in this case. It seems rather preposterous that he would do so voluntarily. The language of the statement is not the accused's own words and the thoughts of the statement are definitely not of his thinking.

> (Training Manual 27-255, Military Justice Procedure, Page 91 in the center of Paragraph 96). It is very definitely stated: "Even a slight assurance of benefit held out by a military superior to an accused on the charges, is ground for rejecting the confession".

The defense counsel should have known this to be the law and his failure to cross examine the person who submitted the statement as to how the statement was obtained, is a failure not only chargeable to him as defense counsel, but also chargeable to the Trial Judge Advocates, and the members of the court.

Respondent's Exhibit "D".

The conviction of the Court martial is invalid and contrary to law.

We refer the court to page 39 of the transcript (middle of the page). We quote:

> "Neither the prosecution nor the defense having anything further to offer, the court was closed and upon secret written ballot, **two thirds** of the members present at the time the vote was taken, concurring in each finding of guilty, finds the accused:
>
> Of Specification 1 of the Charge: Guilty
> Of Specification 2 of the Charge: Guilty
> Of the Charge: Guilty"

We submit to the court for its consideration Section 43, Article of War, as follows: (Underscoring ours)

> "No person shall, by general court-martial, be convicted of an offense for which the death sentence is made mandatory, nor sentenced to death, except by the concurrence of **all** the members of said court-martial present at the time the vote is taken, **and** for an offense in these articles **expressly** made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by concurrence of **three-fourths** of all the members present at time the vote is taken."

In the case at bar, the defendant was tried for the crime of murder. Under Section 92 of the Articles of War, which provides:

> "Any person subject to military law who commits murder or rape **shall** suffer death or imprisonment for life, as a court-martial may direct . . ."

Respondent's Exhibit "D".

The conviction must be voted accordingly.

The defendant Gusik was found guilty. The conviction, in our opinion, should have been found by the vote and concurrence of all the members voting at the time the vote is taken. We respectfully submit to the court that when the accused is once placed in jeopardy for the crime of murder, the verdict of guilty must be voted by all the members of the court martial present at the time the vote is taken.

This is the law in the criminal courts of our country —the verdict of the jury shall be concurred in by all the members of the jury.

The situation present in this case did not approximate war, and we submit that the sentence of the court martial should be arrived at under the same conditions as a criminal trial in the civil courts of the United States— to wit by a concurring vote of all the members of the court voting. (Page 109, Section III of Manual for Courts Martial, U.S. Army).

Even should the court not agree with this view, we submit that even under the most liberal interpretation of the law, the accused could not be found guilty under a vote of less than **three-fourths** of the members of the court martial present and voting. (Instead of "two-thirds" as shown by the transcript at Page 39).

The general court martial was illegal and not appointed in accordance with Article 8, Articles of War, because the Colonel ordering the general court martial in this case, does not show that he was authorized by the President of the United States.

(1) Art. 8, Articles of War — Provides that general courts martial may not be appointed by the Commanding Officer of a District unless upon the express authority of the President of the United States.

(2) The General Court martial in this case was appointed by Colonel Orsinger, Commanding Officer of the Port of Leghorn, and the transcript no where shows his authority.

Respondent's Exhibit "D".

Digest of Opinions, JAG, Page 171, Section 365 (4):

> "The authority of the Commanding Officer to appoint the General Court martial should be shown in the transcript. On the fact of the record the court was never lawfully constituted. And it would therefore be unlawful for it now to receive and take evidence upon and to investigate the legality of its own existence. Its proceedings should be set aside as null and void."

CONCLUSION

In summation, the lawyers representing the accused and the family of the accused, contend that the evidence introduced at the trial was hearsay, leading, contradictory and in many other ways objectionable and improper; that the defense counsel failed to raise objections to this improper testimony; that the defense counsel spent only ten minutes on preparation with the accused prior to the trial; that no attmept was made to obtain witnesses favorable to the accused; that written statements favorable to the accused were not offered at the trial; that no effort was made to impeach the testimony of irresponsible persons and confessed thieve; and that the testimony does not support or justify conviction under the 92nd Article of War. And lastly, that the court failed to recognize the principle that an accused is presumed to be innocent until proven guilty beyond a reasonable doubt.

The Legal Committee wishes to further point out that Gusik at all times was acting in line of duty and in accordance with Special Orders; that he had first been fired upon and had heard men cutting the fence and entering the depot area he was guarding; that he then ordered them to halt and upon their failure to obey this command, the accused open fire and thereafter, three other persons within the en. osure fired simultaneously with the accused and in the same direction and no con-

clusive proof was offered to show that the bullets from the accused's carbine caused the death of either or both of the two Italians.

Maybe the charge of murder in a foreign land just after so many citizens and soldiers had been killed during the war, was not considered of any great importance, but the life of a youthful American soldier performing his duty, and the manner in which the trial was conducted, has shocked the conscience of an impartial, fair-minded group of American citizens, veterans, and civic organizations, to the point where they have taken an interest in behalf of the accused in the name of justice as we understand it in the United States of America.

It is respectfully urged that the Board of Reviews reverse the judgment of the court martial and order the accused to be re-established to his former status.

Respectfully submitted:

Legal Committee of the Joint Veterans Commission of Cuyahoga County.

John H. Price,
President of the Joint Veterans Commission; Past Ohio Department Commander, United Spanish War Veterans.

Morris Morganstern,
Chairman, Legal Com. Joint Veterans Commission; National Vice Commander, Jewish War Veterans.

Leo Chimo,
Judge Advocate, Department of Ohio, Catholic War Veterans of America.

Francis E. Picklow,
County Judge Advocate, Catholic War Veterans, Department of Ohio.

Respondent's Exhibit "D".

Edward J. Sklenicka, Past County Commander, American Legion, Department of Ohio.

Hudson Hyatt,
National Judge Advocate General of the Veterans of Foreign Wars.

Bernard B. Direnfeld, Jr., Vice-Commander, Jewish War Veterans, Department of Ohio.

Anthony Lysowski,
County Judge Advocate, Polish Legion, American Veterans, Department of Ohio.

Joseph Horwitz,
Judge Advocate, Jewish War Veterans, Department of Ohio.

Hon. Judge Charles A. Vanik,
Judge of the Municipal Court of Cleveland, Ohio, and World War II Veteran.

Col. Fletcher Andrews,
Professor of Law, Western Reserve University, Judge Advocate General's Department, U. S. Army.

Chester J. Koch,
Patriotic Coordinator for City of Cleveland, Cuyahoga County Commander of the Army and Navy, and Secretary of the Joint Veterans Commission of Cuyahoga County.

RESPONDENT'S EXHIBIT E

UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY

Washington, 1 June, 1948

I hereby certify that the attached photostatic copy of W.D., AGO Form No. 0850, "Personnel Placement Questionnaire" and the attached photostatic copy of W.D., AGO Form No. 66-1, "Officer's and Warrant Officer's Qualification Card", both relating to Clarence Wilbur Burks, are true and exact copies made from official records presently in the custody of The Adjutant General's Office, Department of the Army, Washington, D. C.

Edward F. Witsell
Major General, U. S. Army
The Adjutant General

I hereby certify that Major General Edward F. Witsell, U. S. Army, who signed the foregoing certificate, is the Adjutant General, US Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof, I, Kenneth C. Royall, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 2nd day of June, 1948.

Kenneth C. Royall
Secretary of the Army.

By James C. Cook
Deputy Administrative Assistant.

(Seal)

PERSONNEL PLACEMENT QUESTIONNAIRE

RATING

Detailed answers should be made as the action taken by the War Department will depend upon the completeness of the information furnished.
Where more space is needed, attach additional sheets.

If practicable, attach a recent photograph showing on back thereof date it was made.

Print or type answers to questions.) Boxes in broken lines for use of War Department only

22 APRIL 1945

1. Name BURKS (Last) CLARENCE (First) WILBUR (Middle)

Army serial No. (if any) 33192183
Mailing address 1300 (number) Brown (street) Avenue Anniston, (city) Ala. (state)

Legal or voting residence Pennsylvania (state) Allegheny (county)

Person to be notified in case of emergency:
Name Mrs. Cora Tate Burks Relationship Wife
Address 1300 Brown Avenue, Anniston, Alabama.

2. (a) Birth March 3, 1912 (Date) Pennsylvania (Place—State or foreign country at time of birth)
(b) Age last birthday 33

3. (a) Parental nativity: Country of mother's birth U.S.A.
Country of father's birth U.S.A.
(b) If married, country of wife's birth U.S.A.

4. State whether or not you are a citizen of the United States and whether by birth or naturalization. (If the latter, append evidence of naturalization, or if evidence not available, state on what date and in what court naturalized.) By Birth

5. Marital status (indicate by "X"): Single ____ Married X Separated ____ Divorced ____ Widowed ____

6. Dependents (number completely dependent on you other than wife) One (1)

7. Race: White ____ Negro X Indian ____ Other (specify) ____

8. In what fields and in what capacity do you consider that you could be of special service to the Government? (List in order of ability.)

FIELD	REASON
INFANTRY	Experience

9. (a) Chronological statement of service in the Army, Navy, Marine Corps, including service as a cadet at U. S. Military or Naval Academy, National Naval Volunteers, National Guard in Federal service, as a Reserve officer on active duty, or at military training camps, or as a contract surgeon serving full time, or as a student in the C. M. T. C. or R. O. T. C., Basic Course, Advanced Course, and Advanced Course camp, giving inclusive dates for each day, month, and year, if practicable, from your personal records. Do *not* write to War Department for exact data.

DATES From	DATES To	Highest grade	Organization (include arm of service)	Duty	Full name and grade of immediate commanding officer
Jul 42	Nov 42	Pvt	IRTC	TRAINEE	Capt. Geo. C. Clowes
Nov 42	Feb 43	Cpl	IRTC	Co Clerk	" " " "
Feb 43	Mar 44	Sgt	IRTC	Plt. Sgt.	Lt. Gerald S. Tate
Mar 44	Jun 44	S/Sgt	IRTC	Opr Sgt	Capt Sherman F. Hayes
Jun 44	----	S/Sgt	365th Infantry	Opr Sgt.	Capt Louis C. Bosetti

W. D., A. G. O. Form No. 6860
April 22, 1942

16—36211-8

(b) Were you ever rejected for any branch of the military service No or for the U. S. O. T. C. No or C. M. T. C. No ? If so, state when and where rejected and cause

(c) Service, showing dates of service and highest grade held, in Officers' Reserve Corps (inactive); National Guard of the United States; Enlisted Reserve Corps (inactive); Naval or Marine Corps Reserve Forces (inactive); National Guard or Naval Militia not in Federal service, or in military or naval forces of foreign countries. (State name of foreign country and when service was performed.)

None

(d) Prior service in Coast Guard, Public Health Service, or Coast and Geodetic Survey. Give dates and nature of service. None

(e) Were all discharges granted under honorable conditions? Yes No or Not applicable

(f) Have you already established military preference with the Civil Service Commission?
Yes X No.
If so, check kind of preference below:
Veteran Disabled veteran.

	Yes	No
10. Are you now a member of		
(a) National Guard		X
(b) Officers' Reserve Corps		X
(c) United States Naval Reserve		X
(d) Marine Corps Reserve		X
(e) Coast Guard Reserve		X

11. Have you registered under the Selective Service Act? X Yes No. If so, give address of local board Board #12, Washingrom, D.C.
If classified, give your classification 1-A Your order number 1050
12. Are you now receiving pay as a retired officer? (Enlisted man?) Yes X No.
13. Are you now drawing compensation or other benefits from the Veterans Administration?
Yes X No. If so, state amount
14. Physical condition is: Excellent X very good fair poor
Height without shoes 5 feet 6 inches. Weight 165 pounds.
15. (a) Have you any physical defect or disability whatsoever? Yes X No.
(b) Have you ever had a nervous breakdown? Yes X No.
If your answer to either (a) or (b) above is yes, give full particulars:

16. Have you ever been turned down for life insurance? Yes X No.
17. Do you hold any elective or appointive office, Federal, State, or municipal? Yes
X No. If so, give details

18. Are you *now* employed by the Federal Government? Yes X No.
(a) If so
(Department or agency) (Bureau)
(b) If you now are or have ever been so employed, give dates:
From to
(Month) (Year) (Month) (Year) (Address)

Experience: In the space furnished below, give a record of important employment, both public and private, which you have had. **Start with your present position and work back to the first position you held.** Describe your field of work and position and give your duties and responsibilities in such detail as to make your qualifications clear.

Present position:

Place U.S. ARMY (City) (State)

From (Month) (Year) to (Month) (Year)

Name of employer

Address

Kind of business or organization.

Number and class of employees you supervised

Name and title of your immediate supervisor

Reason for leaving

Exact title of position

Salary: Starting $ per

Final $

Duties and responsibilities

Machines and equipment you used

Place Washington, (City) D.C. (State)

From March (Month) 1941 (Year) to July (Month) 1942 (Year)

Name of employer U.S. Government

Address Bituminous Coal Comm.

Kind of business or organization Gov't

Number and class of employees you supervised None

Name and title of your immediate supervisor MICHAEL W. STRAUSS

Reason for leaving Army Induction

Exact title of position Ass't Solicitor

Salary: Starting $ 36.00 per Year

Final $3600

Duties and responsibilities Research Work in Labor Dispute Cases

Machines and equipment you used None

Place Washington, (City) D.C. (State)

From June (Month) 1940 (Year) to Mar (Month) 1941 (Year)

Name of employer U.S. Government

Address Dept. of Interior

Kind of business or organization Gov't

Number and class of employees you supervised None

Name and title of your immediate supervisor FLOYD E. DOTSON

Reason for leaving Acceptance of better position

Exact title of position Clerk-Typist in Legal Div

Salary: Starting $ 1800 per Year

Final $ 1800

Duties and responsibilities Typed and filed records of Legal cases for the Dept.

Machines and equipment you used Typewriter

Place ..... (City) ..... (State)
From ..... (Month) (Year) to ..... (Month) (Year)
Name of employer .....
Address .....
Kind of business or organization .....
.....
Number and class of employees you supervised .....
.....
Name and title of your immediate supervisor .....
.....
Reason for leaving .....

Exact title of position .....
Salary: Starting $ ..... per .....
Final $ .....
Duties and responsibilities .....
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Machines and equipment you used .....
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Place ..... (City) ..... (State)
From ..... (Month) (Year) to ..... (Month) (Year)
Name of employer .....
Address .....
Kind of business or organization .....
.....
Number and class of employees you supervised .....
.....
Name and title of your immediate supervisor .....
.....
Reason for leaving .....

Exact title of position .....
Salary: Starting $ ..... per .....
Final $ .....
Duties and responsibilities .....
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Machines and equipment you used .....
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Place ..... (City) ..... (State)
From ..... (Month) (Year) to ..... (Month) (Year)
Name of employer .....
Address .....
Kind of business or organization .....
.....
Number and class of employees you supervised .....
.....
Name and ti of your immediate supervisor .....
.....
Reason for leaving .....

Exact title of position .....
Salary: Starting $ ..... per .....
Final $ .....
Duties and responsibilities .....
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Machines and equipment you used .....
.....

Place ..... (City) ..... (State)
From ..... (Month) (Year) to ..... (Month) (Year)
Name of employer .....
Address .....
Kind of business or organization .....
.....
Number and class of employees you supervised .....
.....
Name and title of your immediate supervisor .....
.....
Reason for leaving .....

Exact title of position .....
Salary: Starting $ ..... per .....
Final $ .....
Duties and responsibilities .....
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Machines and equipment you used .....
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16-26211-4

PERSONNEL LACEMENT QUESTIONN. RE

(Other experience in management or leadership or any special skills not shown under question 19 None

21. In addition to employment in your main field or fields of professional specialization, specify any other qualifications or skills you have acquired through study, civic enterprise, hobbies, construction of instruments, etc. (For example: Photography, aviation, public speaking, civic organizations, cryptanalysis, pigeon training, radio transmission, etc.) Answer specifically (*f*), (*g*), and (*h*) below.

Occupation or skill	Describe work or study
(a) Photography	Hobby
(b)	
(c)	
(d)	
(e)	
(*f*) Experience as an entertainer. None	
(*g*) Experience as an instructor. Swimming	Instructed Swimming for the Red Cross
(*h*) Athletic skill. Football, Basketball, Swimming	

22. Education (includes military service schools):

(*a*) Circle highest grade completed, elementary or high schools:
1 2 3 4 5 6 7 8 9 10 11 (12) Did you graduate? X Yes ..... No.

(*b*)	School (name of institution)	Years attended	Graduate? Yes / No / Year	Degrees	Subject majored in
College	HOWARD UNIVERSITY	4	1934 Yes	BA.	Academic
	TERRELL LAW SCH	2	1936	LLB	LAW
Post-graduate	YALE UNIV.	1	1939		CORP. LAW
Military service school (branch and special)	HARVARD UNIV	1	1940	LLM	International Laws

(c) Other subjects specialized in None

23. Foreign languages (check proficiency).

Language (specify)	Read			Speak			Auditory comprehension		
	Excellent	Good	Fair	Excellent	Good	Fair	Excellent	Good	Fair
Latin		X							
Spanish			X			X			X

24. Foreign travel and residence:
Indicate specifically the duration, location, and nature of any foreign experience you may have had. (Country and subdivision—Use official name as of 1935.)
Dates of travel or residence None
Country
Purpose and nature

25. Describe the work, if any, connected with war activities (including civilian defense) in which you are now engaged Soldier

26. How many days' advance notice will you require before being available for service? None
27. State any other limitations which you care to place on your availability None

28. Have you ever been convicted by a civil or military court? If so, give the date and circumstances.
No

29. Remarks. State any other information you may desire to submit which will be helpful in ascertaining your best field of usefulness None

Signature Clarence (First name) Wilbur (Middle name) Burks (Last name)
(Sign All Names in Full)

(Name typed or printed) CLARENCE WILBUR BURKS

NOTE.—Do *not* send with this questionnaire valuable personal papers such as *Birth certificate, passports, citizenship papers, discharge certificates, warrants, commissions, original letters of commendation, etc.*, which you desire to be returned to you. As a rule these documents are *unnecessary* for the consideration of your case.

U. S. GOVERNMENT PRINTING OFFICE : 16—65061-6

(1) NAME: BURKS (LAST NAME) CLARENCE (FIRST NAME) W (MIDDLE NAME)

(2) SERIAL NUMBER: 0293943[illegible] (3) ARM OR SERVICE: INF (4) COMPONENT: AUS (5) HEIGHT: 5 ft 6 in. (6) WEIGHT: 165 lbs (7) DATE OF BIRTH: MAR 3, 1917 (8) RACE: NEGRO

(9) WAR SERVICE — YEARS / MONTHS / ARM OR SERVICE / COMBAT OR ADMIN DUTY:

(10) C.C.C. SERVICE — YEARS / MONTHS / SERV CON / TYPE DUTY:

(11) ASSIGNMENT LIMITATIONS PHYSICAL — AUTHORITY — OVER-AGE IN GRADE — RETIRED

(12) SERVICE OR RESIDENCE OUTSIDE CONTINENTAL U S — LOCATION — YEARS — MONTHS

(13) ENTRY ON EXTENDED ACTIVE DUTY (ARS, N G, OFF & A U S OFFICERS ONLY) DATE OF ENTRY 15 APR 45 — AUTHORITY PAR 2 SO 98 HQ 5th ARMY DATE 8 APR 45

(14) GRADE—APPOINTMENTS AND PROMOTIONS

	WARRANT OFFICER (JUNIOR GRADE)	CHIEF WARRANT OFFICER	2nd LIEUTENANT	1st LIEUTENANT	CAPTAIN	MAJOR	LIEUT COLONEL	COLONEL
DATE APPOINTED OR PROMOTED			15 APR 45	29 MAY 46				
DATE OF RANK IN GRADE			15 APR 45	29 MAY 46				

SEC 31 EM.

(15) RECORD OF SERVICE (ONLY PRINCIPAL DUTY)

TYPE OF DUTY	UNIT, ORGANIZATION OR STATION	DATES FROM	DATES TO	Number of Par Hours Given	INITIALS	TYPE OF DUTY	UNIT, ORGANIZATION OR STATION	DATES FROM	DATES TO	Number of Par Hours Given	INITIALS
Plat Ldr	Co. K 365th INF	15 Apr 45	12 May 45	VS	[illegible]						
Plat Ldr	Co K 365th INF	13 May 45	[illegible]	VS	[illegible]						
Plat Ldr	Co L 365 INF	[illegible]	30 June	EX	DDD						
Rifle Plat Ldr	Co L 365 INF	1 July 45	15 Oct 45	EX	DDD (67)						
CMST S-4	480th Port Bn	16 Oct 45	30 Oct 45	N.R.							
S-4	Hq 480th Port Bn	1 Nov 45	31 Dec 45	388 (67)	[illegible]						
S-4	480th Port Bn	1 Jan 46	20 Apr 46	52	[illegible]						
Defense Counsel	480th Port Bn	21 Apr 46	30 Jun 46	4.7 (67)	COM						
DEFENSE COUNSEL	DS W/ AG POR JASC	1 Jul 46	31 Dec 46	5.8 (67)	COM						
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]						
COURT'S BAILIFF	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]						
[illegible]	[illegible]	[illegible]	9 Nov 47	WTH	USR						
CASUAL OFF	[illegible] 149 REGT BN	10 Nov 47	[illegible]	[illegible]	USR						

(16) SPECIAL SERVICE SCHOOLS

DATES FROM	DATES TO	SCHOOL	COURSE	Successful Completion (Yes or No)
5 MAR 45	15 Apr 45	LEADERSHIP & BATTLE NCO	Combat Admt Cl #2	✓

WD AGO Form 66 not completed per authority contained in Department of the Army Cable WCL-33482, dated 28 October 1947, which authorizes the Mediterranean Theater of Operations to transfer personnel after 15 November 1947 without preparing a new WD AGO Form 66 and directs that new duty station be notified to prepare new qualification records.

OFFICER'S AND WARRANT OFFICER'S QUALIFICATION CARD

NOTE: DO NOT ATTEMPT TO FILL OUT THIS CARD WITHOUT FIRST RECEIVING CAREFUL INSTRUCTIONS

(19) MARITAL STATUS AND DEPENDENTS — L — 1

(20) LEGAL RESIDENCE — 1300 BROWN AVE — ANNISTON — STATE ALA

(21) EMERGENCY ADDRESS — NAME MRS. LORA I MTC CURRIS — STREET ADDRESS 1300 BROWN AVE — ANNISTON — RELATIONSHIP WIFE — STATE ALA

(22) EDUCATION

	NAME AND LOCATION	SUBJECTS MAJORED IN		
HIGH SCHOOL	4 ALLEGHENY HIGH, PITTSBURG, PA.	HIGH SCHOOL	L	1940
COLLEGE OR UNIVERSITY	4 HOWARD UNIV WASHINGTON D.C.	BS & LAW	L	1944
POST GRADUATE	2 TERRELL LAW SCHOOL	LAW	L	LLM 1945
	2 HARVARD UNIV. CAMBRIDGE, MASS	LAW	L	LLM 1946

(23) TESTS

TEST	DATE	SCORE	TEST	DATE	SCORE	TEST	DATE	SCORE

(24) QUALIFICATIONS - SPORTS

1 BOXING — CLASS — DATE HELD
2 SOFT BALL — POSITION — 2 BASKET BALL — POSITION — FOOTBALL, SWIMMING — CLASS

(25) ACTIVE HOBBIES

1 RADIO 2 PHOTOGRAPHY 3 RIFLE OR PISTOL SHOOTING 4 AVIATION 4 OTHER

(26) MAIN CIVILIAN OCCUPATION — (27) SECONDARY CIVILIAN OCCUPATION

TITLE OF YOUR POSITION OR JOB: HOUSE COUNSELER — LAWYER

EXPLAIN WHAT YOU DID: MADE LEGAL RESEARCH ON LABOR DISPUTE CASES.

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DATES EMPLOYED AND REMUNERATION: FROM 1941 TO 1942 $ 5.00. FROM 1940 TO 1941 $ 5.00.

SPECIFICATION SERIAL NO: 7M/12-40F 68.912

(28) QUALIFICATION IN MILITARY SPECIALITIES

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(30) INITIAL INTERVIEW BY — DATE 21 April 1945

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(Signature of Interviewing Officer)

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[illegible] NOV 44, 1944. COMBAT INF BADGE 12 FEB 45 CLUSTER HQ 3RD ARMY
[illegible] 2 JUL 1942. S/SGT AUS FEB 44. 3 SILVER BRONZE LITTLE STAR
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INDUCTED 2 JUL 42 [illegible] Efficiency Index 84.1 (Jan 46) Disposition (Date of Last Efficiency Index (if not known) N/K

569

NOTICE OF APPEAL

Filed May 17, 1949, Harry F. Rabe, Clerk.

Notice is hereby given that L. C. Schilder, Warden, Federal Reformatory, Chillicothe, Ohio, respondent above named, hereby appeals to the United States Court of Appeals for the Sixth Circut from the final judgment entered in this action on March 31, 1949.

Loren G. Windom
Assistant United States Attorney

Copy of the above notice mailed to Counsel for Petitioner May 16, 1949.

Loren G. Windom
Assistant United States Attorney
Attorney for Respondent

DESIGNATION OF RECORD ON APPEAL

Filed May 26, 1949, Harry F. Rabe, Clerk.

Appellant designates the following as constituting the record upon appeal:

1. Petition for writ of habeas corpus
2. Writ of habeas corpus
3. Return of Respondent
4. Traverse of Petitioner to Return of Respondent
5. Decision of the District Court filed March 31, 1949
6. Judgment of the District Court filed March 31, 1949
7. Transcript of all testimony and exhibits
8. Notice of Appeal
9. Designation of Record on Appeal

Loren G. Windom
Assistant United States Attorney
Attorney for Respondent-
Appellant

Service of the above designation of record on appeal is acknowledged this 26th day of May, 1949.

John H. Baker
Attorney for Petitioner-Appellee

ENTRY

Filed June 6, 1949, Harry F. Rabe, Clerk

Upon application of the Respondent the time for the filing and docketing of the record on appeal is extended to August 15, 1949.

Mell G. Underwood,
JUDGE — Southern District of Ohio

Approval:
Loren G. Windom
Assistant United States Attorney

CERTIFICATE OF CLERK

United States District Court, Southern District of Ohio, Eastern Division.

I, Harry F. Rabe, Clerk of the District Court of the United States for the District and Division aforesaid, do hereby certify the foregoing pages numbered from 1 to 573 inclusive, contain a true and correct copy of the record and proceedings indicated in the designation found on page 572 herein, as the same appears of record and on file in the office of the Clerk of said Court, in the above-entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Columbus, Ohio, the ....., day of ....., 19.....

Harry F. Rabe,
Clerk.

.....
Deputy.

(Seal)

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(January 31, 1950—Before: SIMONS, MCALLISTER and MILLER, JJ.)

This cause is argued by Allan R. Browne for petitioner and by Morris Morgenstern and Bernard B. Direnfeld for respondent and is submitted to the Court.

JUDGMENT

(Entered March 20, 1950)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby reversed, without prejudice to the rights of the appellee to file a new application for a writ of habeas corpus after having applied for the remedy created by amended Article of War 53.

OPINION

(Filed March 20, 1950)

Before SIMONS, MCALLISTER and MILLER, Circuit Judges.

SIMONS, Circuit Judge. This is an appeal by the warden of the Federal Reformatory at Chillicothe, Ohio, from an order of discharge in a habeas corpus proceeding releasing the appellee from custody while under sentence of a military court for murder. The appellee Thomas Gusik was, in August, 1947, a member of a Guard Company stationed at or near Tirrenia, Italy. Early in the morning of August 13, two Italian civilians were shot and killed near the wire fence which enclosed the depot along Gusik's guard post. On September 18 Gusik was charged with the murder of these persons in violation of the 92nd Article of War. Trial was had on these charges before a general court-martial appointed by the Commander of the Port of Leghorn, U. S. Army. There was evidence which, if credited, tended to prove that Gusik had lured certain Italian black-marketeers with whom he had had contact to his post by a prearranged signal, that he had previously threatened to get even with their leader, that he had permitted them to approach and cut the wire without calling upon them to halt or firing a warning shot, and had fired a burst from his automatic carbine at the wire. Conviction and sentence followed.

The record of the trial was reviewed by the Staff Judge Advocate of the Port of Leghorn, who found the evidence sufficient to sustain the findings and sentence and that the court was legally constituted and had jurisdiction of the accused and the offense charged. The Commander of the Port Leghorn approved the sentence. The Board of Review in the office of the Judge Advocate General, reviewed the case and likewise found the trial record legally sufficient to support the sentence, the court legally constituted and with jurisdiction. The Judge Advocate General approved the holding of the Board of Review but recommended to the Secretary of the Army that the sentence be reduced from life imprisonment to 16 years. His recommendation was accepted. Gusik being confined in the Southern District of Ohio, sued out a writ of habeas

corpus in the court below and was discharged from custody on the ground that he was deprived of liberty without due process of law because no thorough and impartial pre-trial investigation had been conducted in compliance with Article of War 70, the trial Judge Advocate failed to call all material witnesses, and Gusik was denied the effective assistance of counsel.

The warden appeals, challenges jurisdiction of the district court to grant the writ, contends that pre-trial investigation pursuant to Article of War 70 is not an indispensable prerequisite to Army court-martial jurisdiction, asserts the competency of the defense counsel as evidenced by his law degrees and wide experience in court-martial procedure, denies that there were errors at the trial but contends that if any were made they may not be collaterally attacked by petition for the writ of habeas corpus. The order of discharge is defended by Gusik not only on the grounds relied upon by the district judge but on the ground that the law member of the court-martial was not a member of the Judge Advocate General's Department and because errors at the trial which, separately considered, might not have been prejudicial yet in their cumulative effect constituted denial to Gusik of his constitutional right to due process of law.

For reasons to be presently set forth we find it unnecessary to consider any of the issues above recited. On February 1, 1949, amended Articles of War became effective. 10 U. S. C. 1472-1593. Article of War 53 as amended provides that upon application of an accused person upon good cause shown, the Judge Advocate General is authorized "to grant a new trial, or to vacate sentence, restore rights, privileges, and property affected by such sentence, . . .". On March 31, 1949, when the order of release was filed, Article 53 was in effect, and a certificate of the Chief of the New Trials Division in the office of the Judge Advocate General of the Army, discloses that no petition or other application for relief under Article 53 had been received on behalf of Gusik up to the date of certification on January 18, 1950. Article 53 provides for the grant of a new trial or the

vacation of a sentence within one year after final disposition of a court-martial case, and in cases involving offenses committed during World War Second, the application may be made within one year after the termination of the war. It is not disputed that the remedy provided by Article 53 was, at the time of the decision below, and still is within permissible time.

Habeas corpus to review the action of another court is in its nature extraordinary. It may not be availed of until other remedies have been exhausted. *Goto* v. *Lane*, 265 U. S. 393; *Ex Parte Hawk*, 321 U. S. 114. It is therefore clear that unless there is validity to one or more of the contentions by which the availability of the new remedy to Gusik is here challenged, the writ of habeas corpus was immaturely filed and improvidently granted.

Gusik contends that by reason of Executive Order 10020, making effective the amended Articles of War as of February 1, 1949, to all court-martial processes taken on and after that date, Article 53 has no retroactive effect with respect to a court-martial sentence imposed, reviewed and approved prior to that date. The text of the President's proclamation is, so far as material, printed in the margin.[1] The contention is without merit. Article 53 is a remedial measure. It creates no new offenses, increases no penalties and is not in any respect punitive. It does not, therefore, come within the constitutional condemnation of an *ex post facto* law. It would be an unfortunate result and one clearly not intended, either by amended Articles or the Presidential proclamation, to deny to soldiers convicted before their effective date,

---

1 "This manual shall be in force and effect in the Army of the United States on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949: PROVIDED, that nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: PROVIDED FURTHER, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: AND PROVIDED FURTHER, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense."

while granting to others a review now deemed necessary to protect them against erroneous convictions.

Rather is it a more salutary principle that now governs this situation. Since the decision in *Vandemark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, there is no longer doubt that the law to be applied by a reviewing court is the law in force when decision is made and not the law as it existed at the time of the trial and judgment. It is a principle that evolves from the earlier case of *U. S.* v. *The Schooner Peggy*, 1 Cranch, 103, and has now been applied by the Courts of Appeal in many cases. Specifically it has been applied by the Fifth Circuit to cases involving convicted soldiers in *Welchel* v. *McDonald*, 176 Fed. (2d) 260, and by the Tenth Circuit in *McMahan* v. *Hunter, Warden* —— Fed. (2d) —— and *Simmons* v. *Hunter, Warden*, —— Fed. (2d) —— and *Hunter* v. *Beets*, decided Feb. 2, 1950. Much is made by the appellee of *Hiatt* v. *Brown*, 175 Fed. (2d) 273 (C. A. 5) now reversed by the United States Supreme Court 18 L. W. 4187. It does not appear that Article 53 was brought to the attention of the court or was by it in that case considered, and within the last few weeks the Fifth Court of Appeals, notwithstanding the *Brown* case, has reversed three orders releasing prisoners on writs of habeas corpus, upon the authority of *Welchel* v. *McDonald*, supra, namely, *Hiatt* v. *Birchfield*, *Hiatt* v. *Fugate* and *Hiatt* v. *Jackson*, —— Fed. (2d) ——. But more important still is the blanket order of the Supreme Court entered on October 10, 1949, —— U. S. ——, denying to prisoners confined in Illinois penitentiaries, writs of certiorari to review decisions on habeas corpus because of an enactment by the Illinois legislature providing a new remedy for persons who assert rights guaranteed them by the Constitution of the United States. See Jenner, the Illinois Post Conviction Hearing Act, Vol. 9, Federal Rules Decisions, 347-454.

Another contention of the appellee is that because Article 53 provides that action taken thereunder upon application for a new trial or vacation of sentence is expressly made binding on all of the courts of the United

States, the remedy provided by that Article is available to Gusik only upon condition that he surrender his right to challenge the jurisdiction of the military court and his deprivation of constitutional rights by applying for a writ of habeas corpus. This provision, he says, is unconstitutional and he should not be compelled to avail himself of an unconstitutional process. The Tenth Court of Appeals disposes of a similar contention in *McMahan* v. *Hunter*, supra, by the observation that it will be time enough to answer the question of finality when it is necessarily involved in an appeal before the court. It seems to us, however, that we meet one aspect of that question now, for it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists. Whether the finality provision, literally read, is constitutional or not, we need not decide, for applying the principle of decision so often availed of, that an issue of constitutionality will not be considered if an act may reasonably be so read that constitutional validity appears, it would seem that all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision collaterally. So read the finality created by Article 53 differs in no wise from the finality, in the absence of or after futile appeal, accorded to trial decisions upon consideration of a writ of habeas corpus.

Finally, the appellee urges that we may not consider the question of exhaustion of remedies because that issue was not raised either in the pleadings or upon hearing below. We reject the argument. Exhaustion of remedies, while not precisely jurisdictional to the consideration of a petition for habeas corpus, nevertheless involves a concept of broad judicial policy stemming from the concern of federal courts to preserve the delicate balance of authority between the state and federal judiciary, between courts and administrative agencies, and between civil and military courts, So viewing it we think reviewing courts are required to apply the doctrine of exhaustion of remedies whether an issue in respect to it was raised below

or not. Only so may there be consistency of decision and the balance of authority maintained.

Without prejudice to the rights of the appellee to file a new application for a writ of habeas corpus after having applied for the remedy created by amended Article of War 53, the decision below is

REVERSED.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *L. C. Schilder, Warden*, v. *Thomas A. Gusik, a Minor, by his Father and Next Friend*, No. 10,978, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 30th day of March, A. D. 1950.

J. W. MENZIES,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 545, Misc.

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circut

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI, ETC.,— June 5, 1950

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 867. The case is also placed on the summary docket and assigned for argument immediately following Whelchel vs. McDonald, No. 429, Misc., now No. 866 on the appellate docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 23 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~545 MISC.~~ 110.

THOMAS A. GUSIK, a minor,
by his Father and next friend, JOHN GUSIK,
Petitioner,

vs.

L. C. SCHILDER, Warden,
Federal Reformatory, Chillicothe, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

MORRIS MORGENSTERN,
BERNARD B. DIRENFELD,
LEO CHIDO,
FRANCE PICKLOW,
MARVIN L. SHAW,
JOHN PRICE, Deceased,
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JOHN BAKER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

THOMAS A. GUSIK, a minor,
by his Father and next friend, JOHN GUSIK,
Petitioner,

vs.

L. C. SCHILDER, Warden,
Federal Reformatory, Chillicothe, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered March 20, 1950 in cause No. 10,978 on its docket, entitled L. C. Schilder, Warden, Federal Reformatory, Chillicothe, Ohio, Respondent-Appellant, v. Thomas A. Gusik, a Minor, by his Father and Next Friend, John Gusik, Petitioner-Appellee, wherein the court reversed the decision of the Federal District Court.

A transcript of the record of the case, including proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

OPINION BELOW.

The opinion of the Court of Appeals below (R. 575-581) is reported at 180 F. 2d 662, decision being rendered on March 20, 1950. The memorandum opinion of the District Court, March 31, 1949, is reported at pages 17 to 23 of the Record.

JURISDICTION.

This Court has jurisdiction to review the judgment in question upon Writ of Certiorari, under 28 U. S. C. 1254 (1).

STATEMENT.

The petitioner, age 18, was a guard stationed at Tirrenia, Italy, in the Occupation Forces of the United States Army having enlisted at age 17. August 13, 1947, the petitioner was on guard duty at a Supply Depot, the compound of which was enclosed with a wire fence (R. 29, 30). Two thieves were shot and killed at the wire fence while they and several other members of their gang were unlawfully entering into the depot to steal United States property during the night season and while petitioner and other soldiers were on guard duty (R. 35, 36). *The shooting was held to be justifiable homicide and Gusik was restored to guard duty* (R. 39, 151, 269, 272, 536). On September 18, 1947, more than one month later, petitioner was charged with murder. On October 9, 1947, a trial by General Court Martial was held (R. 425-428). Petitioner's assigned defense counsel had only one interview with the petitioner before trial, and said interview lasted 10 minutes (at 10 p.m.) at the Army prison and was conducted less than 48 hours before trial time (R. 56, 541) and constituted the entire preparation of said purported counsel. The trial, including recesses, and the Court's deliberations of guilt and sentence took slightly over three hours to complete (R. 437, 486). The defendant was found guilty and sentenced to a dishonorable discharge and a life sentence at hard labor (R. 486).

After the conviction by the General Court Martial, the trial was reviewed by the Staff Judge Advocate on October 13, 1947 (R. 410-417), who affirmed the conviction and sentence. On the same day, the Commander of the Port of Leghorn approved the sentence, pursuant to his au-

thority under Article of War 50½, 10 U. S. C. 1522 (R. 487). On January 16, 1948, the Board of Review in the Office of the Judge Advocate General submitted its holding (R. 312) and review (R. 313-342) in which the sentence and conviction were affirmed. *The Judge Advocate General* approved the holding of the Board of Review and recommended to the Secretary of the Army that the period of confinement be reduced to sixteen years, in which recommendation the *Secretary of the Army* concurred (R. 312-313). *On January 26, 1948,* General Court Martial Order No. 32 was issued by order of the Secretary of the Army, promulgating the sentence as reduced (R. 343). This was a complete exhaustion of appellate reviews as provided for in Articles 48, 49, 50 and 50½ (10 U. S. C. 1519-22) of the Manual for Courts-Martial 1928, then in effect, no further appeal being provided for.

It was the petitioner's contention that he had been denied due process of law, in violation of the Fifth Amendment. These contentions (the same issues as raised in the Federal District Court) were presented to the Appellate Authorities of the U. S. Army,—the Judge Advocate General's Board of Review. Counsel for petitioner appeared at an oral hearing before the said Board of Review on December 15, 1947.

Thereafter, *on April 27, 1948,* the petitioner filed in the Federal District Court for the Southern District of Ohio, his petition for Writ of Habeas Corpus, alleging in essence, that his conviction and sentence were void by reason of denial of due process of law by the said General Court Martial Board; that he was denied a fair and impartial pre-trial investigation in accordance with Article of War 70 (10 U. S. C. 1542); that he was denied the effective assistance of counsel in violation of Article of War 17 (10 U. S. C. 1488); that he was denied counsel of his own choosing in violation of Article of War 17 (10 U. S. C. 1488); that the Trial Judge Advocate suppressed evidence favor-

able to the accused in violation of Article 17 and *paragraph 41d* of the *Manual for Courts-Martial;* that a purported confession was obtained by coercion in violation of Article of War 24 (10 U. S. C. 1495); that the Judge Advocate General's Board of Review, in an abuse of discretion, failed and refused to grant relief upon review, in violation of Article of War 37; and that said denials of due process were in violation of the Fifth Amendment to the Federal Constitution (R. 1-7).

On *June 17, 1948*, the Warden filed his return to the Writ of Habeas Corpus (R. 9-14) wherein he alleged in substance that the petitioner was convicted by a General Court Martial Board; that the Staff Judge Advocate reviewed and approved said conviction and sentence; that the Commanding Officer, Port of Leghorn, reviewed and approved said conviction and sentence; that the Board of Review in the Office of the Judge Advocate General reviewed and submitted its opinion in writing to the Judge Advocate General wherein it approved the conviction and sentence; that the opinion of the Board of Review was concurred in by the Judge Advocate General who recommended that the period of confinement be reduced to 16 years; and that on January 26, 1948, the sentence as reduced was promulgated by order of the Secretary of the Army. Answering further, the Warden denied the allegations set forth in petitioner's petition, alleging that no errors or irregularities occurred; but that if any errors or irregularities did occur they were not questions or issues for consideration by the District Court; that the Board of Review and the *Judge Advocate General* were the only ones qualified to pass thereupon, pursuant to Article of War 50½, *Manual for Courts-Martial*, 1928, then in effect.

A Traverse was thereafter filed by the petitioner, and upon said issues as drawn by the pleadings, hearing was held by the Federal District Court. Evidence was presented by the petitioner in the District Court on *June 28*,

1948, after which the case was continued to *September 8, 1948*, at which time further proceedings were had before the District Court below. Thereafter, the case was continued again until *January 7, 1949*, at the instance of respondent, after which additional testimony was admitted on behalf of the Warden. On *March 31, 1949*, the District Court below, in a Memorandum Opinion (R. 17-23) found that the petitioner had been deprived of his liberty without due process of law, in that the Court Martial Board did not have jurisdiction to try and sentence the petitioner because: (1) he was denied a fair and impartial pre-trial investigation in compliance with Article of War 70, (2) the Trial Judge Advocate failed to call all material witnesses and thus constituted an act inconsistent with a genuine desire to have the whole truth revealed, as prohibited; and (3) was denied the effective assistance of counsel in violation of Article of War 17. That the total effect of these deprivations constituted denial of due process.

Thereafter, on *May 17, 1949*, the Warden filed his Notice of Appeal to the Sixth Circuit Court of Appeals and in said Appeal set forth the following statement of questions involved:

"I. Did the United States District Court exceed its jurisdiction in hearing this action?

II. Is the pre-trial investigation pursuant to Article of War 70, *Manual for Courts-Martial*, 1928 (10 U. S. C. 1542) an indispensable prerequisite to Army court-martial jurisdiction?

III. Was the conduct of the trial judge advocate in not calling all the witnesses listed on the charge sheet an act inconsistent with a genuine desire to have the whole truth revealed, as prohibited by the *Manual for Courts-Martial*, so as to oust the court-martial of jurisdiction to sentence the petitioner?

IV. Was petitioner denied the effective assistance of counsel so as to oust the court-martial of jurisdiction to sentence the petitioner?

V. Was petitioner deprived of his liberty without due process of law?"

The Warden and the petitioner each submitted briefs covering the questions so involved. Thereafter, on *January 30, 1950, one day* before said case was heard on oral argument by the Sixth Circuit Court of Appeals, the Warden filed a reply brief in which, for the first time in the entire proceedings, he contended that the within petitioner had not exhausted his remedies prior to bringing the within cause in the District Court. The Warden contended that Article of War 53, as amended (10 U. S. C. 1525), effective February 1, 1949, was retroactive in character in that it applied to the within cause, and that failure to exhaust this purported remedy was a defect fatal to the jurisdiction of the District Court.

The Court of Appeals in its opinion (R. 575-581) did not consider or pass upon the merits of the case as adjudicated by the District Court. The Court of Appeals below rested its *reversal* of the District Court on its construction of Article of War 53 as amended (10 U. S. C. 1525). The Court of Appeals held that despite the fact that Article of War 53 as amended (effective February 1, 1949) was not in existence when petitioner filed his cause of action in the Federal District Court (April 27, 1948), or when the evidence was heard (June 1948, Sept. 1948, Jan. 1949),

> "The Writ of Habeas Corpus *was immaturely filed* and improvidently granted."

Without passing upon the merits of the case, the Court of Appeals held that it was incumbent upon the petitioner to file a "Petition for New Trial" pursuant to Article of War 53 as amended before filing a petition for Writ of Habeas Corpus in the Federal District Court. Accordingly, the Court of Appeals reversed the decision of the District Court below "without prejudice to the rights of the appellee to file a new application for a Writ of Habeas Corpus after having applied for the remedy created by amended Article of War 53."

STATUTE INVOLVED.

Article of War 53 (10 U. S. C. 1525), effective February 1, 1949, is set out hereinbelow:

> "Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review; Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later; Provided, That only one such application for a new trial may be entertained with regard to any one case; And provided further, That all action by the Judge Advocate General pursuant to this article and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies and officers of the United States."

QUESTIONS PRESENTED.

The questions presented are:

1. Whether Article of War 53 (10 U. S. C. 1525) is constitutional in view of the proviso that "all action by the Judge Advocate General pursuant to this Article * * * shall be final and conclusive * * * and all action taken pursuant to such proceedings, shall be binding upon all * * * courts * * * of the United States."

2. Whether a voluntary subscription to an unconstitutional statute amounts to a waiver of a constitutional right.

3. Whether Article of War 53, as amended, is retroactive.

4. Whether the *Manual for Court's Martial* and the President's Executive Order therein prohibits retroactivity.

5(A) Do the provisions of Article of War 53 as amended constitute a "remedy" within the meaning of the exhaustion of remedies theory?

(B) Is compliance with the provisions of Article of War 53 as amended, an indispensable pre-requisite and mandatory condition precedent to the filing of a petition for a Writ of Habeas Corpus in the Federal Courts?

6. Is Article of War 53, as amended (effective February 1, 1949) applicable to the petitioner's case (filed April 28, 1948) in view of the fact that the petitioner had exhausted all available remedies as of the time petition for Writ of Habeas Corpus was filed in the District Court?

7. Did the failure of the Warden to seasonably raise the issue of Article of War 53 in the lower court constitute a waiver of said issue?

REASONS RELIED UPON FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

The reasons relied upon for allowance of the Writ prayed for are:

1. The case raises an important question concerning the constitutionality of a statute which has not ever been, but should be, ruled upon by this Court.

2. The case raises an important question of construction of a statute which has not ever been, but should be, ruled upon and settled by this Court.

3. There is a divergence of views expressed between different Circuit Courts of Appeals concerning the construction of the finality provision of Article of War 53, as amended, as well as the constitutionality of said statute.

4. The decision of the Court of Appeals is in conflict with the decisions of this Court relating to the exhaustion of administrative remedies.

5. The Court of Appeals below has departed from the accepted and usual course of judicial proceedings in considering matters not raised in the trial court by pleadings, evidence, motion for verdict, motion for new trial, or upon appeal.

6. It is a matter of great general importance and effect to thousands of boys and men who were convicted by Court-Martial Boards during World War II.

CONCLUSION.

Wherefore, the Writ of Certiorari should issue in this cause.

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JOHN BAKER.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

THOMAS A. GUSIK, a minor,
by his Father and Next Friend, JOHN GUSIK,
Petitioner,

vs.

L. C. SCHILDER, Warden,
Federal Reformatory,
Chillicothe, Ohio,
Respondent.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

The opinion of the District Court and the Court of Appeals below are reported respectively in pages 17 to 23 and pages 575 to 581 of the Record; and the grounds on which jurisdiction of this Court is invoked and the statement of the case appear on pages 2 to 6 of the foregoing petition.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court, Judge Mell G. Underwood, is set forth at length on pages 17 to 23 of the Record. The opinion was rendered after a full trial and upon briefs and oral arguments of both parties. The opinion included 26 well considered findings of fact and five conclusions of law.

The District Court essentially found that the petitioner had sustained his burden, by a preponderance of the evidence, to the effect that petitioner had been denied due process of law by the General Court-Martial Board; and that such denial of due process deprived the Court-Martial

Board of jurisdiction to try and sentence petitioner; and thus such conviction and sentence were void. The District Court found:

> "1. This Court has jurisdiction of the parties and the subject matter of this action.
>
> 2. The Court-Martial Court did not have jurisdiction to try the petitioner because no thorough and impartial pre-trial investigation was conducted in compliance with Article of War 70.
>
> 3. The Court-Martial Court did not have jurisdiction to sentence the petitioner because the Trial Judge Advocate failed to call all material witnesses, which was an act inconsistent with a genuine desire to have the whole truth revealed and, therefore, prohibited by the Manual for Courts-Martial, United States Army.
>
> 4. The Court-Martial Court did not have the jurisdiction to sentence the petitioner because he was denied the effective assistance of counsel.
>
> 5. Petitioner has been deprived of his liberty without due process of law and should, therefore, be released from the custody of the respondent."

In support of the above findings, the District Court made twenty-six findings of fact. This decision was rendered on *March 31, 1949.*

At no time during the proceedings, either by the pleadings or by the evidence tendered in the Trial Court, was the issue of Article of War 53 as amended (10 U. S. C. 1525) raised, argued, or even commented upon. More notably, the Warden did not raise said issue (if it be an "issue") by filing a Motion for New Trial. This, despite the fact that Article 53 as amended had been in effect from February 1, 1949.

In the Warden's appeal and brief to the Sixth Circuit Court, no mention was made of Article of War 53 as being relied upon as one of the "Statement of Questions Involved." The Court of Appeals did not consider any of the merits of the case, nor discuss any of the rulings made by the District Court, as set forth above.

The Court of Appeals below held that despite the fact that the petitioner had exhausted all remedies available to him at the time he filed his petition in the District Court below (April 28, 1948) that Article of War 53 (effective date February 1, 1949), was a "remedy" which was available to the petitioner; and that the Writ of Habeas Corpus was "*immaturely filed,*" and "improvidently granted." The Court of Appeals below held that Article of War 53 was retroactive in effect; that the Executive Order No. 10020, of the President of the United States, did not prohibit retroactive effect being given said Article; that the law to be applied is the law in force when a decision is made, and not the law as it existed at the time of trial and judgment; and that therefore Article of War 53 as amended was applicable even though not raised in the Court below.

The Court of Appeals further held that (while declining to rule upon the constitutionality of said provision) Article of War 53 does not mean that which it *literally states* concerning finality of action by the Judge Advocate General. The Court held that "exhaustion of remedies, while not precisely jurisdictional to the consideration of a petition for Habeas Corpus, nevertheless involves a concept of broad judicial policy stemming from the concern of Federal Courts to preserve the delicate balance of authority between the state and federal judiciary, between courts and administrative agencies, and between civil and military courts. So viewing it, we think Reviewing Courts are required to apply the doctrine of exhaustion of remedies whether an issue in respect to it was raised below or not."

Accordingly, the Court of Appeals reversed the decision of the District Court, without commenting upon the merits of the case as decided by the District Court.

STATEMENT OF FACTS.

The essential facts are set forth in the petition.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in reversing the decision of the District Court in the following respects:

1. In holding, in effect, that Article 53 as amended (10 U. S. C. 1525) was constitutional as "reasonably read" but declining to rule upon said provision as "literally read."

2. In holding that the effect of one subscribing to Article 53 would not amount to a "waiver" of a constitutional right.

3. In holding that Article of War 53 as amended is retroactive.

4. In disregarding the Presidential Executive Order 10020, which prohibited retroactivity.

5. In holding that Article of War 53 as amended provides a "remedy"; and constitutes an indispensable prerequisite and mandatory condition precedent to the filing of a Writ of Habeas Corpus in the Federal Courts.

6. In ruling that the petitioner had not "exhausted all other remedies" before filing his petition in the District Court.

7. In considering and ruling upon an issue (Article 53, as amended) not seasonably raised in the lower court; but to the contrary waived and abandoned by the Warden.

ARGUMENT.

1. ARTICLE OF WAR 53 AS AMENDED IS UNCONSTITUTIONAL.

(A) The "finality" clause of Article of War 53 renders the statute unconstitutional.

Article of War 53, as amended, effective February 1, 1949, is unconstitutional and in violation of Article 1, Section 9, Clause 2 of the United States Constitution, which section provides that "the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion."

Article of War 53, as amended, provides:

> "Under such regulations as the President may prescribe, the Judge Advocate General is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial * * *, and provided further, that *all action by the Judge Advocate General pursuant to this article,* and all proceedings, findings and sentences on new trials under this Article * * *, *shall* be *final* and *conclusive* and orders publishing the action of the Judge Advocate General * * *, shall be *binding* upon all * * * Courts * * * of the United States."

This Article, which compels all proceedings, findings and sentences on new trials, to be final and conclusive and binding upon all Courts of the United States, makes the Judge Advocate General's Department of the U. S. Army a super-Supreme Court of the United States.

If the Judge Advocate General in his discretion overrules a motion for a new trial, then a soldier who claims constitutional deprivations in a Court Martial Conviction, is denied the privilege of the Writ of Habeas Corpus because of the compelling verbiage, "final, conclusive and * * * binding upon all Courts of the United States." If on the other hand, one attempts to file the "Great Writ" before filing a petition for new trial in the Office of the Judge Advocate General, the Court of Appeals below held such

a petition is "immaturely filed and improvidently granted." Thus, one cannot file nor be granted a Writ of Habeas Corpus (according to the Appeals Court below), *before* filing a petition for new trial with the Judge Advocate General; and one cannot file a Writ of Habeas Corpus *after* the Judge Advocate General has overruled the petition for new trial (according to Article 53 and the 5th Circuit Court of Appeals in *Whelchel v. McDonald,* 178 F. 2d 760), because of the finality provision. Thus, the Judge Advocate General usurps the powers of the judiciary, and attempts to subordinate the Federal Judiciary to the statute, the findings and decisions of the Judge Advocate General Himself.

In *Burchfield vs. Hiatt,* 86 Fed. Supp. 18, 20, District Judge E. M. Underwood made this highly interesting statement concerning the constitutionality of Article 53, as amended:

> "He further contends that the action taken by the Judge Advocate General under Article of War 53 is final and binding and may not be questioned in a Habeas Corpus proceeding, even though the Court Martial was illegally constituted and without jurisdiction. * * * To construe Article of War 53 as respondent does, would be to suspend the Writ of Habeas Corpus, which, of course is prohibited by Section 9, Article 1 of the Constitution."

There seems to be little doubt concerning the unconstitutionality of the provision that makes Administrative rulings final, conclusive and binding upon all Courts of the United States. The effect of such a provision would be an unconstitutional delegation of power by Congress, and unconstitutional usurpation of the functions of the judiciary; and would also amount to a suspension of the Writ of Habeas Corpus, in contravention of Article 1, Section 9, Clause 2 of the United States Constitution (which section provides that the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion).

(B) Article 53 amounts to suspension of Writ of Habeas Corpus.

If the interpretation of Article of War 53 as contended by respondent were given effect, the net result would be that one could not file a Writ of Habeas Corpus until he has subjected himself to the review provided for in Article of War 53; and that if he did so subject himself as described in Article of War 53 he could not thereafter bring a Writ of Habeas Corpus because said determination, upon review, would be final and binding upon the Courts of the United States. This would make a dead letter of Article 1, Section 9, Clause 2 of the United States Constitution, as it would virtually be a suspension of the Writ of Habeas Corpus. The constitutionality of this provision is seriously questioned.

Several Courts have questioned the constitutionality of said provision, but have held that that provision is not an issue at this time but would be an issue if the Judge Advocate General did not grant relief under Article of War 53. *Whelchel v. McDonald,* 176 F. 2d 260; *McMahan v. Hunter,* 179 F. 2d 661; *Simmons v. Hunter,* 179 F. 2d 664. In view of the fact that one must submit to the provisions concerning finality of the judgment of the Judge Advocate General, upon review, it is in effect requiring the petitioner to subscribe to a clearly unconstitutional provision.

Yet in the case of *Whelchel vs. McDonald,* 178 F. 2d 760, 5th CCA; Dec. 26, 1949, the only reported case in which petitioner availed himself of Article 53, as amended, the Court said:

> "* * * application has been made to the Judge Advocate General for relief and has been denied, and he now seeks to add a new ground of attack upon the judgment of conviction, which was not presented in the District Court. This we think cannot be done. *Moreover, the last words of the amended Article of War 53 seems to make the action of the Judge Advocate Gen-*

eral refusing a new trial binding upon the Courts of the United States.'' (Motion denied.) (Emphasis added.)

This last pronouncement is clear and concise, yet startling and amazing. It is clear and concise that an aggrieved soldier may be denied a petition for a new trial by the Judge Advocate General of the United States Army and it is startling and amazing that this same aggrieved soldier who fought for his country all over the world is denied that sacred constitutional right of the Writ of Habeas Corpus therefor. Surely, the framers of our constitution did not envision a situation of this kind. The enormity of such a denial is a crushing blow to the ideals of liberty loving Americans. In the case of *Crowell vs. Benson,* 285 U. S., 22 (1931) it was held:

> ''It is the question whether the Congress may substitute for Constitutional Courts, in which the Judicial power of the United States is vested, an Administrative Agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whatever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.''

In *Ex Parte Milligan,* 71 U. S. 2, 4 Wall, 218 L. Ed. 281, it was held:

> ''Our fathers knew—the history of the world told them—the nation they were founding, be its existence

short or long, would be involved in war, * * * and that unlimited power, wherever lodged at such a time, was especially hazardous to free men."

The Court held that neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution; except so far as the right is given to suspend in certain cases the privilege of the Writ of Habeas Corpus.

In *Ex Parte Billings*, 46 Fed. Supp. 663, it was held:

"The history of the Writ of Habeas Corpus is lost in antiquity. But it was in use before the Magna Charta and exists today as part of the fundamental law of the land. It is a Writ which cannot be abrogated or its efficiency curtailed by legislative action. Its position is made secure by the provision of Article 1, Section 9 of the Constitution."

"Judge Murrah of the Tenth Circuit Court of Appeals has said: 'The Writ of Habeas Corpus is a shield that guards and protects the constitutional liberties of the American citizen. Through it we inquire to see whether fundamental rights have been violated. Its function or use should not be construed or employed so narrowly as to defeat the salutary purpose it serves in our system of government.' All matters or proceedings seeking to restrain one of his liberty should be strictly construed against the government and in favor of the citizen.' *Lunsford vs. Hudspeth*, 126 Fed. 2d 653, 659.

"Habeas Corpus in character is that of a civil proceedings. It seeks the enforcement of civil rights. Resort to the Writ is had not to inquire into the criminal act of which complaint is made, but into the right of liberty, notwithstanding the act, and the immediate purpose to be served is relief from illegal restraint.

"The ultimate inquiry is the jurisdiction of the holding authority (here, the Army). *Collins vs. Johnson*, 237 U. S. 502; *Frank vs. Margum*, 237 U. S. 309.

"We think that the essential independents of the exercise of the Judicial power of the United States in the enforcement of constitutional rights requires that

the Federal Court should determine such an issue upon its own record and the facts elicited before it."

There appears to be a grave and serious conflict of opinions between some of the Appeal Courts, and between some of the District Courts that have considered the constitutionality of the "finality provision" of Article 53 as amended. To summarize, we find that in the case of *Burchfield vs. Hiatt,* 86 Fed. Supp. 18, Judge Underwood held that said finality provision rendered Article 53 clearly unconstitutional in that it amounted to a suspension of the Writ of Habeas Corpus. Thereafter, the Fifth Circuit Court of Appeals in the case of *Whelchel vs. McDonald,* 176 Fed. 2d 263, held that the petitioner was required to file for petition for new trial under Article 53 before filing his petition in the Federal District Court, holding that "the action taken on such application is expressly made binding on all courts of the United States, and that this remedy is much better adapted to reach justice than any within the power of the District Court on Habeas Corpus."

At the time the Fifth Circuit considered Article of War 53, the Court refused to rule on the constitutionality of the "finality provision" holding that it was moot at present and that it would be time enough to rule on said clause when it appeared before the court. Thereafter, the Fifth Circuit granted a stay of execution of its reversal pending the petitioner's filing under Article 53 with the Judge Advocate General. The Judge Advocate General failed to accord the petitioner relief, whereupon the petitioner in *Whelchel vs. McDonald,* 178 Fed. 2d 760, filed a motion for a rehearing. In overruling the motion for rehearing (after "remedy" under Article 53 had been exhausted) the Fifth Circuit held that "* * * *the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States.*"

The Tenth Circuit Court of Appeals in the case of *McMahan vs. Hunter, Warden,* 179 Fed. 2d 661, held that

it was not necessary to the disposal of the appeal to pass upon the constitutionality of Article 53, and held that "we express no opinion thereon. There will be time enough to meet and answer that question when it is necessarily involved in an appeal before the Court."

The Sixth Circuit Court of Appeals in the *instant case*, held that it was necessary to rule on "one aspect of that question (constitutionality) now, for it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists." This Court held the finality provision means the "decision upon the merits is final and does not go to those contentions which attack decision collaterally." This is exactly contrary to the holding (cited above) of the Fifth Circuit Court of Appeals in *Whelchel v. McDonald*, 178 F. 2d 760.

The Sixth Circuit Court of Appeals held that as "reasonably read" Article 53 is constitutional; but as "literally read, we need not decide."

Thus, it may be readily seen that the Federal Courts are floundering about in their interpretations of Article 53, each adopting a view that seems feasible to them. Each court seems to have given its own unique interpretation and construction, and no uniformity exists between said decisions between the courts.

Bearing in mind that Article 53 has direct bearing and effect upon thousands of soldiers convicted by Court-Martials during World War II, this section is of paramount importance. With the lives of several thousand men affected by Article 53, it becomes incumbent upon this Court to give a clear, concise and unambiguous interpretation of Article 53, as well as determining the constitutionality of this section. For that reason, Certiorari should be granted.

2. A VOLUNTARY SUBMISSION TO THE PROCEDURES OF ARTICLE 53 WOULD AMOUNT TO A WAIVER OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Article of War 53 specifically provides that the Judge Advocate General "is authorized *upon application* of an accused person and *upon good cause shown, in his discretion* to grant * * *." There is no other language which provides that an accused *must* file a petition for a new trial; nor is there any language in the Act which makes it mandatory upon the Judge Advocate General *to hear* an application for new trial; nor is there anything in the language of Article of War 53 which makes it mandatory upon the Judge Advocate General to grant a new trial or any other relief prescribed under Article of War 53.

There is nothing *mandatory* in Article of War 53 that requires that a petition for new trial be filed, nor is there anything in the Article of War 53 which sets it as a prerequisite to the filing of a Writ of Habeas Corpus in a Federal Court; especially when the petition alleges that the conviction and sentence is void. Examining the language of this section further it should be noted that "* * * upon application of an accused person, and upon good cause shown, in his (Judge Advocate General's) discretion to grant a new trial, or to vacate a sentence * * *." The section contains certain provisos which also attach to the filing of a petition for new trial under this section. That is, in order for one to file a petition for new trial he must (a) do so "within one year after termination of the war"; (b) make "only one such application"; and (c) "must submit and agree that the Judge Advocate General's ruling thereon shall be final and conclusive and * * * shall be binding upon all * * * Courts * * * of the United States." It should be noted that (a), (b) and (c) above are all prefaced with the word "provided," or "provided further";—thus making (a), (b) and (c) above, conditions to the petition for new trial.

There seems to be little doubt concerning the unconstitutionality of the provision that makes administrative rulings final, conclusive and binding upon all courts of the United States. The effect of such a provision would be an unconstitutional delegation of power by Congress, and unconstitutional usurpation of the functions of the judiciary; and would also amount to a suspension of the Writ of Habeas Corpus, in contravention of Article I, Section 9, Clause 2 of the United States Constitution (which section provides that the privilege of the Writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion).

If the interpretation of Article of War 53 as given by the Appeals Court below were given effect, the net result would be that one could not file a Writ of Habeas Corpus until he has subjected himself to the review provided for in Article of War 53; and that if he did so subject himself as described in Article of War 53 he could not thereafter bring a Writ of Habeas Corpus because said determination, upon review, would be binding upon the Courts of the United States. This would make a dead letter of Article I, Section 9, Clause 2 of the United States Constitution, as it would be a suspension of the Writ of Habeas Corpus.

Several Courts have questioned the constitutionality of said provision, but have held that that provision is not an issue at this time but would be an issue if the Judge Advocate General did not grant relief under Article of War 53. In view of the fact that one must submit to the provisions concerning finality of the judgment of the Judge Advocate General, upon review, it is in effect requiring the petitioner to subscribe to a clearly unconstitutional provision. It is clear that no one is required to ascribe or comply with a Statute that is unconstitutional. For these additional reasons, this Court should reject the Appeals Court's theory that petitioner has not exhausted all his remedies and is *required* to file a petition for new trial. It

should be noted under Articles of War 48, 49 and 50, as amended by the 1949 Manual for Courts Martial, the Judge Advocate General is *required* to review "all cases involving sentences not requiring approval or confirmation by the President." There is absolutely *nothing*, in Articles of War 48, 49, 50 and 51, as amended in 1949 Manual for Courts Martial, which *requires* one to file a *petition for new trial.* Article of War 53, herein discussed, makes it *discretionary* on the part of the convicted person as to whether he chooses to file a petition for new trial. In other words, he *may* submit to the provisions of Article of War 53 (albeit unconstitutional) and file a petition for new trial or he may avail himself of his constitutional rights to file a Writ of Habeas Corpus and set forth therein that his conviction and sentence were null and void because (a) a Court-Martial Board was not legally constituted and (b) because he was denied due process of law which in turn deprived the Court-Martial Board of jurisdiction. No Administrative Agency, the Judge Advocate General's Office included, can breathe life into a void order.

As between two alternatives available to the petitioner, one to proceed under an unconstitutional provision, and another to proceed by availing himself of his constitutional right of filing his Habeas Corpus. It certainly cannot be held that the petitioner must pursue an alleged remedy under an unconstitutional provision. The constitutionality of that section becomes immediately at issue because Gusik must submit himself to the entire provision thereof. It is submitted, that if the petitioner would submit himself to the provision of Article of War 53 he would be subjecting himself to the "finality" provision thereof;—even though said section is clearly unconstitutional; and he would be waiving the unconstitutionality of said section of Article of War 53 by voluntarily following the discretionary procedure of Article 53.

The Appeals Court below agreed that:

"* * * it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazard exists."

The Court then, however, offered their interpretation of Article 53 and concluded that the finality provision of Article 53 should not be literally read and that:

"* * * all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision collaterally."

This interpretation of Article 53 however is in direct conflict with the holding of the Fifth Circuit Court of Appeals in the case of *Whelchel v. McDonald*, 178 F. 2d 760 wherein that Court held (after relief pursuant to Article 53 was denied by the Judge Advocate General) that:

"Moreover, the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General refusing a new trial binding upon the Courts of the United States."

The petitioner is in a position of not knowing where he stands in relationship to his constitutional rights under the above interpretations. For this reason certiorari should be granted.

3. ARTICLE OF WAR 53, AS AMENDED, IS NOT RETROACTIVE.

(A) To be retroactive, the statute must be clear and unequivocal and allow of no other interpretation.

It is the contention of petitioner that error was made by the Court of Appeals below in stating that the petitioner must resort to Article of War 53, as amended, since said article was in effect at the time that the *order of release was made*, although said article was not in effect at the time the within cause was filed, docketed, heard and submitted.

Such a ruling is repugnant to the basic principle against retroactivity and retrospectivity. As is seen in the citation of the following cases, our courts have, from the earliest dates to the present time, affirmed and reaffirmed the rule that laws are not to be considered retrospectively unless the legislation makes such consideration absolutely necessary, by the words of the act.

In as early a year as 1806, the Supreme Court of the United States set forth this principle in a case which is cited as authority for the rule, from the year 1806 to the present time. In that case, *The United States v. Heth*, 3 Cranch 398, this Court said:

> "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially be adhered to when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

It is evident by the citation of the basic principle as set forth in the above case, that statutes are not to be given retrospective construction unless they are explicitly retroactive within themselves and can be subject to no other interpretation.

Throughout the history of our great nation, the right to the writ of habeas corpus has been zealously guarded. As Chief Justice Marshall stated in 1829 in the case of *John Reynolds, Tenant the United States; Plaintiff v. Duncan M'Arthur, Defendant*, 2 Peters 417, 27 U. S. 417:

> "It is a principle which has always been held sacred in the United States, that laws by which human action are to be regulated, look forward, not backward; and

are never to be construed retrospectively unless the language of the act shall render such construction indispensable."

Certainly the case at hand is one in which human action is regulated. It is a case that clearly calls for *prospective* consideration, and *not* retrospective consideration. There is nothing in the language of the act which renders a retroactive or retrospective consideration in the least necessary, let alone indispensable. It follows therefore that retrospective construction and retroactive application of Article of War 53, as amended, endangers the right to the writ of habeas corpus. Said article is not one that can properly be construed retrospectively.

In the well known and oft cited, *20% Cases*, XX Wallace 179, 87 U. S. 179, this Court re-affirmed in positive terms the rule against retrospective interpretation of statutes, unless the language of the statute explicitly expresses the intention that it is to be applied retroactively.

This Court in 1860 affirmed the principle and rule against retrospectivity, in the case of *William S. McEwen and Henry H. Wiley, Plaintiffs in Error v. John Den, Lessee of Charles Bulkley and Stuart Brown*, 24 Howard 242, 65 U. S. 242. In this case, the court said:

"We think that the Statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that *it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears.*" (Emphasis added.)

This Court in the case of *Hamilton, Murray Use, etc. v. John A. Gibson*, 15 Howard 423, 56 U. S. 423, reiterated the rule against retrospective operation of statutes. Mr. Justice Daniels speaking for the court stated:

"As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed

a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

In commenting upon this rule as it affects the rights of parties, the court said:

"Especially should this rule of interpretation prevail, where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties to restrict the assertion of those rights."

The principle which so clearly affects the rights of petitioner should certainly be applied in the instant case. At the time that application for writ of habeas corpus was made in April, 1948, Article of War 53, as amended, was not in effect. Petitioner submits, that since said article is neither retroactive by direct language nor by retrospective construction, the order of release was properly made. As regards construction, what is not there specifically should not be construed by implication, unless such be indispensable to the act itself.

In 1940, in the case of *Haggar Company v. Helvering, Commissioner of Internal Revenue*, 308 U. S. 389, this Court said:

"Retrospective declaration of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, it would seem, ought not to be implied more than the legislative intention to give retroactive operation to a new statute."

In the case of *Harvey v. Tyler*, II Wallace 328, 69 U. S. 328, the rule against considering statutes retrospectively, was affirmed by this Court, the court saying,

"* * * it is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

In *Schwab, Executor of Dickel v. Doyle, United States, Collector of Internal Revenue for the Fourth Collection District of Michigan*, 258 U. S. 529, Mr. Justice Butler, speaking for the court, asked:

"If retroactivity be accepted what shall mark its limit?"

Referring to retrospectivity, the court stated:

"* * * a statute should not be given a retrospective operation unless its words make that imperative."

Further reference to retrospectivity is found when the court says:

"* * * *laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared.*"

Quoting *Story on Constitutional Law*, Sec. 1398, the court says:

"Retrospective laws are indeed generally unjust; and has been forcibly said, neither accord with sound legislation nor with the fundamental rule of the social compact."

Again referring to the validity of retroactive and retrospective laws, the court says:

"There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. *It is the sense of the situation that that which impels prohibition in such case, exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.*

"The Act of September 8, 1916, is within the condemnation.

"There is certainly in it no declaration of retroactivity, clear, strong, and imperative which is the condition expressed in United States v. Heth, 3 Cranch

398, 413 2 L. ed. 479, 483 also United States v. Burr, 159 U. S. 78, 82, 83, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the case that that which rejects retroactive operation must be selected."

In 1938, Mr. Justice Roberts, in the case of *Hassett, Former Acting Collector, v. Welch, et al., Executors,* 303 U. S. 303, said:

"In view of other settled rules of statutory construction, which teach that a law is presumed in the absence of clear expression to the contrary, to operate prospectively, that if doubt exists as to the construction of a taxing statute, that doubt should be resolved in favor of the taxpayer." (303 U S. 303.)

Certainly, since doubt is resolved in favor of the taxpayer as regards *property* rights, then in accordance with all that is fair and just, and in accordance with the rule as stated by Chief Justice Marshall in the case of *Reynolds v. McArthur,* 2 Peters 417, 27 U. S. 417,[1] the statute in question should not be considered retrospectively, for if property rights are so protected, then certainly human rights should be accorded at least equal treatment.

Mr. Justice Harlan, in *Chew Heong v. The United States,* 112 U. S. 536, speaking for the court says:

"Courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

---

[1] "It is a principle which has always been held sacred in the United States, that laws by which human action are to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable."

Then, after citing the above rule, as set forth in the case of *The United States v. Heth*, 3 Cranch 398, 413, the court goes on to say:

> "So far from the Court being compelled by the language of the Act of Congress, to give it a retrospective operation, the plain, natural and obvious meaning of the words, interpreted with reference of the general scope and the declared purpose of the statute, utterly forbids the conclusion that there was any intention to impair or destroy rights previously granted."

In *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457, the court stated:

> "Ordinarily, statutes establish rules for the future, and they will not be applied retroactively unless that purpose plainly appears." (280 U. S. 327.)

In the case of *Davis, et al. v. Rockton & Rion Railway*, 65 F. S. 67, decided in March, 1946, the court speaking of the growth of the rule against retrospective construction, states:

> "Furthermore, it is now well established by the Supreme Court in a consistent line of cases from its earliest days to the present time that statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed, and that they will not be given retroactive effect or construction to change the status of pending claims unless the legislative purpose so to do plainly appears."

On appeal, the above case was heard and judgment affirmed, in *Rockton & Rion Ry. v. Davis, et al.*, 159 F. 2d 291, the court held:

> "It is a familiar rule of law, that retroactive legislation is not favored and that statutes are to be construed as operating not retroactively but only prospectively, unless a contrary intention is manifest in either the language of the statute or the clear and unmistakable purport of the legislature."

Petitioner respectfully submits that Article of War 53 as amended, is not a retroactive statute either by direct language or by construction. It follows, therefore, that in accordance with the law, as herein set forth, that it is not subject to retrospective interpretation.

(B) Retrospective interpretation of Article of War 53, as amended, would be punitive as to petitioner and fall within prohibition of ex post facto laws.

The Court of Appeals below stated that Article of War 53, as amended, is remedial and not punitive. Assuming (but not conceding) that it is remedial, the retroactive application by retrospective construction of the statute as against petitioner would be punitive. It would wrongfully take away his right to the writ of habeas corpus for which petitioner had already applied. The Appeals Court below erred in its judgment, because, since the application for the writ was made before the enactment of the article, then denial of the writ by retrospective construction of the article would make it punitive as to petitioner, for it would deny him the right to a writ for which he had already applied. Such retrospective interpretation would make him relinquish the writ of habeas corpus, *taking away from him a vested right, contrary to the Constitution of the United States.* It would deny to him a basic and sacred right, in which every citizen of our nation places extreme faith and believes inviolate.

To deny to petitioner the right to this great writ for which he had already applied, is not only repugnant to the rule against retrospective construction of statutes, but it is also repugnant to Article I, Section 9, Clause 2, of the Constitution of the United States *which allows suspension of the writ only in times of rebellion or invasion, and only then, when public safety requires such suspension.*

(C) There was no congressional intent to make Article 53 retroactive.

Article of War 53, as amended, can not be applied retroactively against the petitioner, unless the act specifically calls for retroactive application or unless it is clear from the act itself that Congress intended that it be applied retroactively. Since there is nothing in the language of the act itself that compels retroactive interpretation, then the only manner in which the existence of a contrary intention can be determined is by examining the intentions and purposes of Congress, as reflected in the committee hearing reports. An exhaustive examination of the Congressional Record of the "Committee on Armed Services Hearing," House 1, Pt. 2, 80th Congress, Hearing No. 125, wherein Article of War 53, as amended, was discussed reveals that *nowhere* in the entire Congressional committee hearings is there any comment whatsoever concerning *retroactivity of Article of War 53,* as amended, or any other of the Articles of War as amended. This despite the fact that the Judge Advocate General and the Assistant Judge Advocate General both testified before the Armed Services Committee. In view of the failure to mention retroactivity of said statute by the Congressional committee, or the Judge Advocate General, petitioner contends that Article of War 53, as amended, was not intended to be retroactive. Further, since there is nothing in the language of said article that compels retroactivity, it follows that the article must be construed prospectively.

4. THE EXECUTIVE ORDER OF THE PRESIDENT OF THE UNITED STATES PROHIBITS RETROACTIVITY OF ARTICLE 53.

The Appeals Court below erroneously held that Article of War 53 is retroactive in its application, though the effective date of said Article is February 1, 1949, and despite the Executive Order (Preface page IX) of the Manual for

Courts-Martial, U. S. Army, 1949, wherein said Order (which puts into effect said Articles of War) provides that the Articles therein shall *not* be retroactive or apply to *actions commenced prior to* February 1, 1949. We respectfully refer the court to the said Executive Order 10020, by the President of the United States, Harry S. Truman, wherein it is provided:

> "This manual which shall be in force and effect in the Army of the United States *on and after* February 1, 1949, *with respect to all court-martial processes taken on or after February 1, 1949:* Provided, that *nothing contained in this manual shall be construed* to invalidate any investigation, trial in which arraignment has been had, or other *action begun prior to February 1, 1949;* and *any such* investigation, trial, or *action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial 1928:* Provided, further, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: And provided further, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense." (Emphasis added.)

It is further provided in the *Manual for Courts-Martial,* 1949, page 1 that:

> "The sources of military jurisdiction include the Constitution and International Law. The specific provisions of the Constitution relating to military jurisdiction are found in the powers granted to Congress, *in the authority vested in the President* and in a provision of the Fifth Amendment."

Thus, it becomes apparent that the President has the power, under the Constitution, not only to prescribe the order which puts in effect the amendments as passed by Congress, but also to set forth the effective date thereof. Further, the President's authority is set forth in the first

paragraph of said Executive Order pursuant to the authority vested in the President by the Act of Congress which amended said Articles of War. Paragraph 1 of said Executive Order provides:

> "By virtue of the authority vested in me by Chapter II of the Act of Congress entitled "An Act to Amend an Act Entitled 'An Act for making further and more effectual provision for the national defense and for other purposes,' approved June 3, 1916, and to establish military justice," approved June 4, 1920 (41 Stat. 787), as amended by Title II of the Act entitled "An act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes," approved June 24, 1948 (62 Stat. 627) and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, U. S. Army 1949."

The second paragraph of the Executive Order specifically provides *directions to the contrary* so far as applying retrospectively to the 1949 Manual for Courts Martial. The Executive Order, which is a part and parcel of the Manual for Courts Martial, 1949, provides that nothing contained in the Manual "shall be construed to invalidate any investigation, trial in which arraignment has been had, *or other action begun prior to February 1, 1949;* and any such investigation, trial *or action so begun may be completed in accordance with the provisions of the Manual for Courts Martial, 1928:* * * *" In view of the unequivocal expression contained in the new manual, the contention of the Appeals Court below that Article 53 is retrospective, must fail.

The manual (President's Executive Order) makes a prohibition against either the substantive or the procedural sections of the New Manual being retrospective, and the court errored in rejecting the provisions of the President's Executive Order.

5. ARTICLE OF WAR 53 IS NOT AN INDISPENSABLE PREREQUISITE TO THE EXHAUSTION OF REMEDIES THEORY: NOR IS THE PETITION FOR A NEW TRIAL (THEREUNDER) A MANDATORY CONDITION PRECEDENT TO THE FILING OF A WRIT OF HABEAS CORPUS.

(A) Petition for new trial, pursuant to Article 53, is not a "remedy."

In the very recent and leading case of *Levers, Adm. v. Anderson,* 326 U. S. 219, 222 (1945), this Court ruled on an almost identical situation as involved here. In the *Levers* case an alcohol tax question had been adjudicated by the alcohol tax unit, all administrative procedure of appeal having been exhausted. The Act provided that a motion for re-consideration could be filed with the Administrator, and the administrator was given discretionary powers under said Act to change or modify his original order. The Administrator did, however, make a final ruling on the merits of the case. Suit having been brought in the Federal Court, the Government contended that said suit was prematurely filed in that the plaintiff had not "exhausted his administrative remedies," by filing the permissive "motion for new trial." This Court rejected such theory and held that:

> "the 'long settled rule of judicial administration (is) that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted.' *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51. But this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought. This is shown by our past decisions * * * from which we see no reason to depart. * * *"
>
> "The orders here challenged were entered after a hearing and they were of a definite character dealing with the merits of a proceeding." (page 223.)
>
> "The regulations only provide that the supervisor 'may hear the application for a rehearing.' No other lan-

guage of the regulations, and no satisfactory proof of publicly established practice under them, persuades us that the 'may' means must, or that the supervisors were required to hear oral argument."

"* * * there is no assurance that a rehearing will be granted * * *. Consequently, whatever weight such factors might be accorded in determining administrative finality of the orders is absent here." (p. 224.)

"Our conclusion is that the motion is in its effect so much like the normal formal type of motion for rehearing that we cannot read into the Act an intention to make it a prerequisite to the judicial review specifically provided by Congress." (p. 224.)

The Court of Appeals below, in disregard of the above cited decision, erroneously held that the petition for new trial (Article 53) was a "remedy"; and that inasmuch as the petitioner had not filed an application for new trial under Article 53, "the Writ of Habeas Corpus was immaturely filed and improvidently granted." This decision of the Court of Appeals is directly contrary to the settled rule as expressed by this Court in 1945 in the *Levers* case above.

While the Manual for Court-Martial does not specifically provide for judicial *review* of Court Martial convictions, the right of an accused to file a Writ of Habeas Corpus based upon illegal conviction and sentence and detention is undisputed. That right is guaranteed by Article 1, Section 9, Clause 2 ("the privilege of the right of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it"). It is not possible to read into Article of War 53 an intent to make said Article an indispensable prerequisite to the filing of a Writ of Habeas Corpus, guaranteed by the Constitution.

The *Levers v. Anderson* decision (326 U. S. 219) by the Supreme Court (1945) is in conformity with the long line of decisions of this Court to the effect that an application to an administrator (or administrative body) for a rehear-

ing is not a necessary preliminary to the bringing of a suit in the Courts.

Hollis v. Kutz, 255 U. S. 452;
B. & O. R.R. Co. v. Railroad Comm., 196 Fed. 690;
Re Arkansas Rate Cases, 187 Fed. 290;
Atchison T. & S. F. R. Co. v. Love, 174 Fed. 59;
Atlantic Coast Line R. Co. v. Interstate Comm. Com., 194 Fed. 449;
Chicago R. Co. v. Ill. Comm. Com., 277 Fed. 970.

There is absolutely nothing in the language of Article 53 that compels the interpretation that it was a congressional intent to make the filing of a petition for new trial, pursuant to Article 53, as amended, an indispensable pre-requisite to the filing of a Writ of Habeas Corpus.

An examination of the congressional record of the "Committee on Armed Services hearings," House I Pt. II, 80th Congress, hearing number 125, wherein Article of War 53 was discussed, reveals that *there is absolutely no comment whatsoever* concerning the procedures of Article 53 being a *pre-requisite* to the filing of a Writ of Habeas Corpus.

In the case of *Prendergast vs. N. Y. Telephone Co.*, 262 U. S. 43, this Court emphatically reiterated the rule that the filing of a petition for reconsideration before the same officer, board, commission or tribunal that had finally passed upon a matter is not and should not be an indispensable step in exhausting the administrative remedy.

The ordinary petition for re-hearing is not and should not be a pre-requisite to judicial review of an administrative order.

Prendergast v. N. Y. Teleph. Co., 262 U. S. 43;
U. S. v. Abilene I. S. R. Co., 265 U. S. 274;
Banton v. Belt Line R. Corp., 268 U. S. 413;
cf: *Vandalia R. Co. v. Public Serv. Comm.*, 242 U. S. 255;

B. & O. R. Co. v. Railroad Comm., 196 F. 690 (cc);
Chicago R. Co. v. Illinois Comm. Comm., 277 F. 970 (dc);
Canadian River Gas v. Terrell (DC) 4 F. Supp. 222.

By the same token, the provision for the filing of a petition for new trial is in its effect like the usual normal formal type of motion for re-hearing. In processing an appeal from a lower court to a higher court can it be contended that the motion for re-hearing must be filed by an appellant before he can process an appeal? Obviously, motions for re-hearing and reconsideration are permissive in character and not mandatory requirements to the orderly administration of appellant precedures. In that regard it should be noted that the Petition for a New Trial (Article 53, as amended) is not an absolute "right" that the petitioner may employ. Such a petition can only be granted "in the discretion of the Judge Advocate General." Further, the Article provides that application by the accused "may" be made. It is *not* a mandatory procedure. Article 53 confers no more than the *authority* upon the Judge Advocate General to grant the relief of that section *if* an accused chooses to subject himself to the discretion of the Judge Advocate General. It does not create a "remedy."

In the case of *Hollis v. Kutz*, 255 U. S. 452, 192, this Court passed upon a similar situation and held:

> "We do not perceive any advantage in requiring a party to file a complaint asking the commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. * * * and when they (plaintiffs) stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into Court."

In the case of *B. & O. R. R. v. Railroad Comm.*, 196 Fed. 690, 693, the Court discussed that section of the Act which conferred authority upon the Commission to grant re-

hearing and held: *"It confers an authority, instead of a remedy."* The Court specifically rejected the contention that *a permissive rehearing was a "remedy."*

(B) Law does not require futile gestures.

This Court has reiterated time and again that the exhaustion of the remedies afforded by a State before applying for a Writ of Habeas Corpus in the Federal Court was based upon the theory that the State Court should be given the opportunity to deal with a question as to (a) an invalid sentence (b) jurisdiction (c) denial of a constitutional right (denial of counsel, due process, etc.) and accord the privilege of correcting its own records and pass upon its own cases. See annotation, 88 L. Ed. 576, 595.

In the instant case the administrative agency involved, —the army,—was afforded the opportunity of correcting its own records and did pass upon the merits of this case. Its ultimate Appellate Authority, the Judge Advocate General reviewed the merits of the within case and found that the record was "legally sufficient" and that "there were no errors injuriously affecting the substantial rights" of the petitioner, and denied relief. (R. 312, 341.)

Article 53 provides that the Judge Advocate may grant relief if, in his discretion, the application shows "good cause." The Judge Advocate General has ruled in his initial review (just prior to the filing of this action in the Federal Courts) that there was not "good cause" shown. It is absurd to require the petitioner to undergo the futile and idle gestures of having the same ruling by the same person.

The law does not require one to undergo futile or idle gestures! See *Wade vs. Mayo*, 334 U. S. 672.

As Justice Frankfurter recently stated in *Darr vs. Barford*, 18 Law Week 4217, 4224 (April 3, 1950):

> "The Great Writ of liberty ought not to be treated as though we were playing a game."

In further reference to the procedural requirements concerning Habeas Corpus, Justice Frankfurter stated:

> "Surely it is necessary to consider what a procedure requirement means before making it a requirement."

By the same token, we are confronted in the instant case with the Sixth Court of Appeals adopting the construction of Article 53 advocated by the Respondent, to the effect that a permissive petition for new trial, the allowance of which is in the discretion of the Judge Advocate General, is an indispensable prerequisite and mandatory condition precedent to the filing of a Writ of Habeas Corpus in the Federal District Court. This erroneous holding should be reversed and brought into conformity with the previous rulings of this Court to the effect that a petition (or motion) for a new trial need not be filed before one brings his action in the Federal Courts.

6. ADMINISTRATIVE REMEDIES ARE EXHAUSTED WHEN THE JUDGE ADVOCATE GENERAL RULES ON THE INITIAL APPELLATE REVIEW.

The Judge Advocate General did review and pass upon the merits of the conviction and sentence of the within petitioner (R. 313). This review took place on January 26, 1948, at which time the recommendations of the Judge Advocate General's Board of Review was approved and the sentence reduced from life imprisonment to sixteen (16) years. As of January 26, 1948, there were no further remedies, within the army itself, available to the within petitioner. This review by the Judge Advocate General, and as approved by the Secretary of the Army, was more than one (1) year prior to the effective date (February 1, 1948) of Article of War, as amended. As of April 28, 1948, the date upon which the within Petitioner filed his petition for Writ of Habeas Corpus in the Federal District Court, he had exhausted every available avenue of the appellate procedure then provided by law (Articles 48, 49, 50, 50½, Manual for Courts Martial, 1928).

Having exhausted all statutory appellate proceedings provided by the law then in effect[1] the petitioner filed his Writ in the District Court claiming he had been denied due process of law, and that the Court Martial Board was without jurisdiction to try or sentence him.

The ruling by the *Judge Advocate General* was upon the merits of the case, and after an oral hearing (counsel for the petitioner being present) before the Judge Advocate General's Board of Review. At said hearing, the same contentions, in substance, were raised by the petitioner as were asserted in the Federal District Court. The Judge Advocate General's Board of Review held that the record of trial was "legally sufficient" (R. 312) and that "no errors injuriously affecting the substantial rights of the accused were committed" (R. 341). The Petitioner, still of the opinion that his constitutional rights had been violated availed himself of the only remedy not yet exhausted—the petition of Writ of Habeas Corpus. The Federal District Court, after a lengthy trial and receipt of evidence, sustained the petitioner's contentions; granted the Writ, and discharged the petitioner from illegal restraint.

7. ARTICLE OF WAR 53 WAS NOT SEASONABLY RAISED IN THE LOWER COURT BY THE RESPONDENT.

The record of trial in the District Court below is devoid of any assertion by the Warden as to the applicability of Article of War 53, as amended (10 U. S. C. 1525), in this matter. Only on January 30th, 1950, exactly one day prior to the date set for oral argument before the United States Court of Appeals, *by reply brief*, did the Warden present the claim as to the applicability of Article of War 53 (10 U. S. C. 1525), to the within petitioner.

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[1] The merits of the case were successively reviewed, approved and confirmed by each of the following: Staff Judge Advocate, Commander Port of Leghorn, Board of Review in Judge Advocate General's Office, Judge Advocate General, and Secretary of the Army. (R. 9.)

Article of War 53 was not an issue in the original application, return or traverse! On that basis Article of War 53 was not seasonably raised in the lower court and could not thereafter be asserted in the appeals court as the necessity of raising all questions except jurisdiction below is imperative.

The law is clear that one must seasonably raise an issue, except jurisdiction, in the lower court or that issue will be considered as having been waived. This doctrine was expressed in the leading case of *Helvering v. Wood*, 309 U. S. 344 (1940), wherein it was held:

> "The Board of Tax Appeals purported to place its decision solely on Sections 166 and 167 of the Act * * * Petitioner in his assignments of error specifically sanctioned only Sections 166 and 167, not Section 22(a). * * * Though petitioner in his petition for certiorari relied on Section 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. * * * To open here for the first time and in face of the express disclaimer on inquiry into the broader field is not only to deprive this court of the assistance of a decision below but to permit a shift to a ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

The Warden, in the instant case, used every string in its collection to circumvent the District Court's decision of freeing Thomas Gusik, the petitioner. It went to such extremes as transporting at great expense witnesses from their Italian and California areas. All the vast resources at its command were expended to the end that a Court Martial adjudication, which its highest echelons had reviewed, would prevail. Not once, however, did it raise the issue of Article of War 53 (10 U. S. C. 1525), either during the District Court hearing or thereafter by a Motion for

a New Trial. In desperation, and as a last resort, by reply brief, which was filed just one day before the Court of Appeals review, did the respondent raise the issue of Article of War 53, and by so doing add another string to its bow. This addition of an issue, according to the decision of *Helvering v. Wood*, 309 U. S. 344, was not proper as the respondent is not entitled to raise it in the Appellate Court (in purported reply) when he did not raise it in the District Court below.

The same Circuit Court of Appeals, Sixth Circuit, on April 26, 1948, in *DeWaters v. Macklin Co.*, 167 Federal 2nd 694, said:

> "Appellee urges as an additional ground, for the first time in this court, the provisions of Section 9 of the Portal-to-Portal Act of of 1947, Ch. 52, Public Law 49, May 14, 1947, 29 U. S. C. 4, #258, which provides in substance that in any action commenced prior to the date of the commencement of the enactment of the Act, no employers shall be subject to any liability to pay minimum wages or overtime compensation under the Fair Labor Standards Act if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation, of any agency of the United States. * * * This action was filed May 24, 1945; the judgment was entered on Dec. 31, 1946, both dates being prior to the enactment of the Portal-to-Portal Act. Accordingly, the provisions of the Act were not considered by the District Court. *We recognize the rule that where there is a change in the applicable law subsequent to the judgment in the trial court and pending appeal, the reviewing court will apply the law as it is at the time of the review. * * * But the rule is not applicable where the issue has not been made in the trial court and the court's judgment does not include a ruling on the issue.*"

This *DeWaters v. Macklin Co.* decision, made by the same Circuit Court of Appeals that adjudicated the instant

case, supports the petitioner's contention. Here we have an instance of a Circuit Court of Appeals diverting from its own rulings on the same issue without overruling said decision. Only a decision of the Supreme Court of the United States could settle this conflict. The filing of the petitioner's original Writ of Habeas Corpus was made in good faith and relying on remedies having been exhausted prior to its filing. In good faith the petitioner had relied on every administrative regulation, order, ruling and request prior to his application in the Federal Court. The respondent, in reply, never questioned petitioner's position.

Only as a last resort, and in desperation, did the respondent, by Reply Brief, which was filed just one day prior to the Appellate Review, raise the issue of the applicability of Article of War 53, 10 U. S. C. 1525, which had become effective only a short time before the District Court's ruling and after all the evidence had been presented. The Warden's contention, at that late date, called for the petitioner's compliance with a then non-existent procedural step. The Appellate Court, in upholding the respondent's contention, ignored its own ruling laid down in the case of *DeWaters v. Macklin Co.* The fact that the instant case involves a human right, as distinguished from a property right, makes it all the more imperative that the Appellate Court should have followed the precedent it established in *DeWaters v. Macklin Co.*

The United States Supreme Court, in the case of *The Pennsylvania Railroad Co. v. Public Utilities,* 298 U. S. 170, reasserted the principle that *a point not made in the complaint will not be considered by the Appellate Court.* Article of War 53, 10 U. S. C. 1525, not having been made a point in the District Court hearing, cannot be made an issue in the Appellate Court. The desertion of this principle by the Appellate Court in the instant case cries for reconsideration.

In the case of *The General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, *this Court censored the Circuit Court of Appeals for having considered a contention that had not been before the court below.* In the instant case, Article of War 53, 10 U. S. C. 1525, although in effect at the time of the decision of the lower court, was not raised prior to the decision of the District Court. In addition, it was not raised by the respondent in a possible Motion for a New Trial. Further, at the time of Warden's filing of the appeal to the Circuit Court of Appeals, the issue of Article of War 53 was not raised or presented. The injection of this issue into the litigation did not originate until one day prior to the date set for the oral hearing before the Circuit Court of Appeals. This Appellate consideration of an issue, which was neither presented to nor ruled upon by the lower court, represents reversible error.

It was held in the case of *Pierce v. Brown*, 7 Wall. 205, that *formal defects in proceedings not objected to in the Court of original jurisdiction cannot be assigned as an error in an appellate tribunal.* There is no record in the instant case of Article of War 53, 10 U. S. C. 1525, having been raised in the original tribunal. Contentions, which the record does not show to have been presented directly or indirectly, to the trial court, by way of pleading or otherwise, before final judgment, and which were not made the subject of complaint in the motion for a new trial—cannot be considered by the Supreme Court. See *Southern Pine Lumber v. Ward*, 208 U. S. 126.

It is too late on appeal to object, for the first time, to the particular form of the action. Marine Bank v. Fulton County Bank, 2 Wall. 252. *An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for a new trial after verdict. American Tobacco v. Werckmeister*, 207 U. S. 284. *An Appellate Court will not express any opinion upon a de-*

fense which was not brought to the attention of the court below. Bell v. Bruen, 1 How. 169.

Such questions only as are specified in the assignment of errors are, in general, to be regarded as open in the appellate court: Schalely v. Rew, 23 Wall. 331. Objections taken below and incorporated in the bill of exceptions will be considered as abandoned where they are not urged in the appellate court. *Ewing v. Howard*, 2 Wall. 499. *The appellate court will not inquire into questions not made on the peadings nor involved at the hearing. Patton v. Taylor*, 7 How. 132.

A question cannot be considered by the superior court when it was not presented to the court below, and the evidence upon the point is not contained in the record. *Washington & G. R. Co. v. Gladman*, 15 Wall. 401. The ends of justice are not promoted by allowing parties to stand by and not take exceptions, and afterwards reverse judgments for omissions, which, if noticed at the time, would have been corrected. *Townsend v. Jamison*, 7 How. 706.

The exceptional circumstances of the instant case brings to light a situation in which the respondent was made conversant with all the District Court's later findings of fact and conclusions of law. At its own initial appellate Judge Advocate review (counsel for petitioner presented brief and oral argument), petitioner raised those same issues upon which the District Court found for petitioner. The Judge Advocate's initial appellate review board chose to find itself sacrosanct and saw no denials of due process. When the District Court found in favor of the petitioner, the respondent, in desperation, looked for an escape and attempted to use the avenue of Article of War 53, 10 U. S. C. 1525, by first raising it just one day prior to the Circuit Court's appellate review. By this means it is attempting to secure another opportunity to again find itself sacrosanct in a second appellate review. The Court of Appeals erred in adopting such construction. The United States Su-

preme Court, in a similar situation, found in *Hormel v. Helvering,* 312 U. S. 552, 556, 1940;

> "Ordinarily an appellate court does not give consideration to issues not raised below for our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevent to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence * * * The Supreme Court said that the Court of Appeals should pass by, with decision, questions not raised below * * * unless exceptional circumstances that would result in injustice so compel."

Further reiterating the necessity of raising all the questions, except jurisdiction, below before they can be considered on appellate review, the courts have held: The Supreme Court of the United States will not consider a question not raised below. *Pacific State Box & Basket Co. v. White,* 296 U. S. 176. Objections not raised in the court below will not be considered in the Supreme Court. *Sonzinsky v. U. S.,* 300 U. S. 506. The Supreme Court will not consider a point first raised by the petition for certiorari. *Helvering v. Minnesota Tea Co.,* 296 U. S. 378. A question raised for the first time by assignment of error in the U. S. Supreme Court will not be considered by it. *White River Lumber Co. v. Arkansas ex rel. Applegate,* 279 U. S. 692. Objections on Federal grounds not presented by the record or passed upon by the State Court will not be considered in the Supreme Court. *Susquehanna Power Co. v. State Tax Commission,* 283 U. S. 291. The Commissioner of Internal Revenue is not entitled to have a decision in the Supreme Court of a point upon which he sought no ruling from the Board of Tax Appeals or the Circuit Court of Appeals. *Helvering v. Tex-Penn Oil Co.,* 300 U. S. 481.

One who remains silent when he should have spoken will not be heard when he should be silent. *Hayward v. Eliot National Bank,* 96 U. S. 611. One who was silent when he should have spoken cannot be permitted to speak at a later period after conditions have altered as regards the other party. *U. S. v. Shrewsbury,* 23 Wall. 508. The respondent, having failed by his silence, to insert the issue of Article of War 53, 10 U. S. C. 1525, into the District Court hearing, is thereby estopped from asserting it in the appellate hearing and especially is this so when petitioner's release has already been secured in the District Court.

The Court of Appeals, below, committed error in considering said issue, and disregarding the merits of the case. This departure from the accepted standards of judicial procedure warrants this Court's intercession and correction.

CONCLUSION.

The writ of certiorari should issue.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 110

THOMAS A. GUSIK, A MINOR, BY HIS FATHER AND NEXT FRIEND, JOHN GUSIK,

Petitioner,

vs.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO,

Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Throughout the brief of the respondent it is asserted that the review provided under Article of War 53 is a "better one" and should be used in lieu of the filing of writ of habeas corpus in the Federal District Court. This Court has reiterated from the case of *In Re Grimley*, 137 U. S. 147, through the pronouncements of *Humphrey* v. *Smith*, 336 U. S. 695, *Wade* v. *Hunter*, 336 U. S. 684, *Hiatt* v. *Brown*, 339 U. S. 103, that the Federal District Courts have jurisdiction to inquire into and test the jurisdiction of a Court-Martial Board. In the event the Court-

Martial Board was without jurisdiction such conviction is void *ab initio*, and the Federal Courts have the power to so declare if they find jurisdiction lacking.

The Federal District Court, in the instant case, found that the Court-Martial Board did not have jurisdiction to try or sentence the within petitioner. The District Court granted the writ of habeas corpus because the Court-Martial Board did not have jurisdiction. The Sixth Circuit Court of Appeals did not pass upon the lack of jurisdiction of the Court-Martial Board, but held that the *District Court* did not have jurisdiction by reason of Article of War 53 being enacted by Congress ten months after the filing of the within writ of habeas corpus in the District Court.

One of the legal questions thus narrowed down for consideration by this Court is whether Article of War 53 precluded the within petitioner from seeking relief by writ of habeas corpus in the District Court. The petitioner contends that Article of War 53 did not preclude the District Court from acquiring jurisdiction of the Court-Martial Board for the following reasons:

(1) Article of War 53 is unconstitutional, in that, the "finality" provision thereof amounts to a suspension of the writ of habeas corpus.

(2) That Article of War 53 is not retroactive.

(3) Article of War 53 is not an indispensable prerequisite and mandatory condition precedent to the filing of writ of habeas corpus.

(4) That all administrative remedies were exhausted when the Judge Advocate General and the Secretary of the Army ruled on the prior appellate reviews.

The "Finality" Clause of Article of War 53 Renders the Statute Unconstitutional

The Solicitor General in his brief to this Court is of the opinion that the finality provision of Article of War 53 does not mean exactly what it says. He does not quarrel with the proposition that if such statutes did make the findings and holdings of the Judge Advocate General final and binding upon all Courts of the United States it would be clearly unconstitutional. His opinion is that it merely codifies that which has been the practice throughout the years. This interpretation by the Solicitor General is in direct conflict with the interpretation heretofore given by the Judge Advocate General (who passes upon applications for petitions for new trials). In the case of *Burchfield v. Hiatt*, 86 F.S. 18, 20, the Judge Advocate General (then acting as counsel for the respondent warden) contended that the "finality" provision of Article of War 53 precluded Federal Courts from making any inquiry whatsoever as to jurisdictional questions concerning Court-Martial Boards.

The Judge Advocate General's contentions were summarized by the District Court on page 20 of said decision wherein it is stated as follows:

> "He (Judge Advocate General) contends that the action taken by the Judge Advocate General under Article of War 53 is final and binding and may not be used in a habeas corpus proceedings, even though the Court-Martial Board was illegally constituted and without jurisdiction. * * * To construe Article of War 53 as respondent does would be to suspend the right of habeas corpus, which of course is prohibited by Section 9, Article 1 of the Constitution." (Material in parenthesis added).

In the case of *Whelchel* v. *MacDonald*, 176 Fed. 2nd 260, the Judge Advocate General (again acting as counsel for the respondent warden) contended that Article 53 precluded a Federal Court from inquiring into the jurisdiction of a Court-Martial Board. The Fifth Circuit Court of Appeals in their opinion (Page 262) stated that:

> "Article 53, 10 USCA 1525, provides for the grant of a new trial. * * * The action taken on such application is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the District Court on habeas corpus."

This same Court of Appeals thereafter in *Whelchel* v. *MacDonald*, 178 Fed. 2nd 760 again stated:

> "Moreover the last words of the amended Article of War 53 seems to make the action of the Judge Advocate General *denying a new trial binding* upon the courts of the United States." (Emphasis added.)

Thus we say that the Judge Advocate General has consistently contended that the finality provision of Article of War 53 precludes a Federal District Court from inquiring into the jurisdiction of a court-martial board.

The 5th Circuit Court of Appeals in the *Whelchel* v. *MacDonald* case was the pioneer in passing upon the finality provision and their decision in that regard has been followed by the Tenth Circuit Court of Appeals and was cited as the basis for the decision by the Sixth Circuit Court of Appeals in the within case. After having propounded and contended that the finality provision of Article of War 53 prevented Federal Courts from making any inquiry—and after several Circuit Courts of Appeals had adopted said construction, the Solicitor General now alleges that the petitioner has had a "misconstruction of the interpretation."

When the Uniform Code for Military Justice was presented on the floor of the Senate, the following expressions of Senator Pat McCarran, Chairman of the Senate Judiciary Committee, is set forth (96 Cong. Rec. page 1413):

"Mr. McCarran: Most important of all, the proposed code provides that the quondam court of military appeals—in fact an administrative body—in its decisions shall bind 'all departments, courts, agencies, and officers of the United States.' When it is noted that the only absolute right of appeal to this court is granted to Admirals and Generals alone, very careful scrutiny should be given the bill to determine whether or not an administrative agency can thus rob the Supreme Court of its appellate jurisdiction.

"Mr. McCarran: What does the bill mean when it says 'binding on all departments, courts, agencies or officers of the United States'? Does not that attempt to bind the courts?

"Mr. Kefauver: As I said, it is the same language at which was in the Kem amendment in 1948. It attempts to bind the courts on all matters except jurisdictional matters.

"Mr. McCarran: Why does it not say 'all matters except jurisdictional matters'?

"Mr. Kefauver: The Humphrey case, of course, decided that the Congress through its enactment, did not, and could not, under the Ninth Amendment to the Constitution, intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters. It was the decision of the Humphrey case that the courts still have jurisdiction, and that the law does not take away the jurisdiction of the courts in habeas corpus proceedings. * * * (Page 1415.)

"Mr. McCarran: * * * Nothing emphasizes my position more than does the reference made by the able Senator from Tennessee to a Supreme Court decision. Undoubtedly in the case to which he has referred, the Army was arguing that a writ of habeas corpus would not lie. There was no question about that. If they

argued it at that time, they will argue it again. Are we going to enact laws which will set aside the rights of civilians in the armed services, rights which are fundamental to the democracies of the world? It seems to me that we would be placing those rights in jeopardy. It seems to me that that question should be considered from a viewpoint other than the military viewpoint."

Petitioner Exhausted All Military Statutory Appellate Reviews

The Solicitor General and the Judge Advocate General (in the Court below) attempted to draw some sort of analogy between Section 2255 of Title 28, U.S.C.A. and A.W. 53. This contention is without merit and may be disposed of as was disposed of by Judge Underwood in the case of *Burchfield* v. *Hiatt*, 86, F.S. 18, 20 wherein he stated that:

"Section 2255 of Title 28 U.S.C.A., provides a remedy by motion for correcting or modifying a judgment in the court of conviction and requires recourse to this remedy, unless it is inadequate or ineffective, before applying for writ of habeas corpus, but this section is inapplicable here and its requirements cannot be read into Article of War 53, for a number of reasons. I think it clear, in the first place, that Congress had no such intention. If it had, it could easily have said so. The distinction between the civil courts and courts-martial is by the Constitution and laws and court decisions always kept clear. The provisions of Section 2255 are wholly inappropriate to Article of War 53. They refer to United States Courts, not courts-martial, while Article 53 is directed not to a court or court-martial, but to an executive officer, who is not bound by the law of the case, but is authorized, in his discretion, to grant a new trial, vacate a sentence, restore rights, and grant other relief, all partaking of the nature of executive clemency rather than the determination of rights in accordance with

judicial process. The application is to the Judge Advocate General, not to the court-martial which tried the applicant, and is passed upon not by the trial court, as under Section 2255, but by an executive officer acting for the President and under regulations prescribed by the President, who may finally dispose of the entire matter without even referring it back to the court-martial."

"* * * If the court-martial was without jurisdiction, the trial was a nullity and petitioner should be discharged; if it was illegally constituted, it was without jurisdiction."

The Judge Advocate General (as counsel for the within respondent before the Sixth Circuit Court of Appeals) stated in his brief filed (seven months after the effective date of A.W. 53) the following statement as set forth on page 11 thereof:

"It is well to look for a moment at the scope of inquiry within which a District Court is confined in a habeas corpus proceedings, specifically where there is involved the proceedings of a military tribunal *wherein there was had the complete military statutory appellate and review procedure.*"

We are at a loss to reconcile that view with the one propounded in this Court by the Solicitor General to the effect that the petitioner had not exhausted all administrative remedies (see pages 5 to 7, 11, respondent's brief).

It is the petitioner's contention that Article of War 50½, in effect at the time the petitioner was convicted by the Court-Martial Board and also in effect at the time that the Judge Advocate General examined said conviction and sentence, is the same as its successor statute, A.W. 53. A.W. 50½ (see Appendix A) provides that:

"When in a case in which * * * the Board of Review holds the record of trial wholly insufficient to sup-

port the findings, or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the Board of Review, such finding and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, * * *. In the event that the Judge Advocate General shall not concur in the holding of the Board of Review, the Judge Advocate General shall forward * * * his own dissent therefrom directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authorities or confirming authorities below, in whole or in part, with or without remission, mitigation, commutation or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part * * *. When the President or any reviewing or confirming authority disapproves or vacates a sentence * * * he may authorize or direct a rehearing, * * * Provided, that such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the Board of Review approved by the Judge Advocate General's holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authorities."

This is substantially the same proceedings as is contained in Article of War 53. The remedies contained in Article of War 50½ and the remedies contained in Article of War 53 differ very little in effect. The petitioner had exhausted all of these remedies prior to the time of the

filing of his writ of habeas corpus on the 28th of April, 1948. Must the petitioner after having complied with all available remedies resubmit his appeal before the Judge Advocate General's Department after having exhausted all of his remedies provided at the time of filing his writ of habeas corpus in the Federal District Court on April 28, 1948?

Respondent has stated to this Court that the finality clause of A.W. 53 is merely a codification of the finality rule which had already been in effect and recognized by the courts. If this is so, then the same finality that attaches to A.W. 53 did attach to A.W. 50½, in effect at the time petitioner was convicted and his case reviewed by the Judge Advocate General. It further follows that if the reviews of A.W. 50½ were "*final,*" then the petitioner exhausted all his administrative remedies at the time he filed his petition for a writ of habeas corpus in the District Court.

Major General Thomas Green, the Judge Advocate General of the Army, in comparing A.W. 50½ to A.W. 53, stated to the House Subcommittee of the Committee on Armed Services (Hearings: House 1, B.T. 2, 80th Congress, Hearing No. 125, page 1926):

> "Well, under the present law the case has come before a board of review, which consists of three officers of the Judge Advocate General's department. Certain of the court martial cases, those which involve a penitentiary sentence, those where the dishonorable discharge is not dispensed, all officers' cases and all death cases, are reviewed by these boards.
>
> "Now these boards, of which there are now four in my office, consider merely the legal sufficiency of the record. If the record is legally sufficient, they pass it. Thereafter somebody must take *the final action.* In some of these cases they come to me for *final action;*

some go to the Under Secretary of War and of course some go to the President."

Thus it is apparent that the reviews heretofore provided under A.W. 50½ represented a complete and full statutory appellate review by the military. In further discussions before the subcommittee General Green was discussing the proposed Judicial Council to be formed in the Judge Advocate General's office. His answer to the Chairman of that committee is extremely pertinent (page 1927):

"Mr. Elston: What appeal would there be from a decision of the Council?

"General Green: If it is approved by the Judge Advocate General there would not be any appeal. That is a *final appeal. It takes the place of what the Secretary of War does now, and what I do and in certain cases what the President does.*"

The within petitioner, Gusik, had his case reviewed by the Judge Advocate General and by the Secretary of War, both concurring in the findings and opinion of the Board of Review. That is the final appeal which General Green refers to under A.W. 50½, then in effect.

Upon what basis can it be held that the petitioner did *not* exhaust all administrative, military appellate reviews available to him?

We repeat, if the review under A. W. 53 represents a final review, then the review under A. W. 50½, the predecessor statute, is likewise final. Brigadier General Hubert D. Hoover, Assistant Judge Advocate General, stated to the House Subcommittee (page 2118):

"* * * paragraph (h) of Article 50 * * * expands the present provisions of Article of War 50½ with respect to the finality of court martials judgment. It is specifically provided that the findings and sen-

tences, the proceedings and the executed punishments under the sentences shall be final and conclusive. The plan is well established at present, but the amendment is somewhat more definite than the present article."

Thus, it may be seen that the same remedies available under A. W. 53 were available under A. W. 50½, and that the same procedures followed in A. W. 50½ were carried over into A. W. 53; and that the finality of A. W. 50½ represents a complete exhaustion of military appellate reviews.

In the case of *Wade* v. *Hunter*, 336 U. S. 684, the petitioner, Wade, was convicted under the provisions of the 1928 Manual for Courts-Martial,—as was Gusik, the within petitioner. Both Wade and Gusik went through the identical appellate review and procedures of the Judge Advocate General's Office. Justice Black, after reviewing the factual background of the case in *Wade* v. *Hunter*, supra, stated that:

"After exhausting his right to military review, petitioner brought this habeas corpus proceedings in a Federal District Court."

In the within case, the petitioner, Gusik, exhausted the same military appellate reviews and procedures that this Court has already declared constitutes exhaustion of the military reviews required. This is the same view taken by the Judge Advocate General who represented and was counsel for the respondent in the Court of Appeals below.

It is contended by the respondent that the Judge Advocate General has a better system for administering justice than the Federal District Court through its use of the Great Writ of Habeas Corpus. The form of relief provided for in A. W. 53 is substantially the same relief

that was available to the Judge Advocate General under the provisions of Article of War 50½, in effect when he reviewed the within cause under the appellate procedure thereunder. The Judge Advocate General, upon full and complete review, held that the court martial board had jurisdiction and that no errors affecting the substantial rights of the accused had occurred and that the record was legally sufficient and the sentence in conformity with law. So secure was the Judge Advocate General in his conviction, that as counsel for the warden in the District Court below, he reiterated the Judge Advocate General's findings, and urged it as a basis upon which the District Court should find against the petitioner. The District Court found that the court martial board did not have jurisdiction to try or sentence Gusik and thereupon granted the writ of habeas corpus. In the Sixth Circuit Court of Appeals the Judge Advocate General (again acting as counsel for the respondent warden) again reiterated his findings and declared there was no merit to the petitioner's contentions or the District Court's findings. It is now asked by the Solicitor General that the petitioner be required to again resubmit his case to the Judge Advocate General for reconsideration.

Would it not be a futile gesture to require one to submit one's case to the final consideration of that person (Judge Advocate General) who had previously held that there was no merit to the petitioner's contention and had so reiterated such contentions through the Federal Courts below?

Respondent contends that relief has been granted in 11.7 per cent of the cases adjudicated by the Judge Advocate General, under Article of War 53, and suggests that this relief accorded may well act as a substitute for the historic constitutional right to test the jurisdiction of a court martial board by the writ of habeas corpus in a Federal

court. Obviously, such a contention, to say the least, is without merit.

What does "relief" mean? Does it mean that a reduction of sentence from life to 16 years is a substitute and cure in a case where the court martial board had no jurisdiction to try or sentence a petitioner? Does the release of a prisoner upon parole act as a substitute for constitutional deprivations? Whether the figure be 11 per cent, 1 per cent, or 90 percent we dare not surrendered our constitutional rights for expediency. There can be no substitution for rights under the constitution.

The respondent further argues that Article of War 53 is a remedy "presently available at the very time petitioner is seeking to invoke the jurisdiction of the civil courts. He must exhaust that present remedy before he is entitled to pursue his petition for a writ of habeas corpus." (Page 19, respondent's brief.)

If that contention were sound then the petitioner might never have a Federal Court pass upon the jurisdiction of the Court-Martial Board. To illustrate the possibilities that would emanate from the adoption of such a contention let us assume that the within petitioner were to file a petition for a new trial, pursuant to Article of War 53 tomorrow. Let us assume further that the Judge Advocate General would deny relief and that the petitioner would file another application for a writ of habeas corpus in the Federal District Court. Let us further assume that the Federal District Court again finds that the Court-Martial Board was without jurisdiction and grants the writ. Assuming that the above procedure would take until after May 31, 1951, (the effective date of the new Uniform Code of Military Justice) to complete, the Judge Advocate General could then contend that the Federal District

Court did not have jurisdiction because there was yet a "remedy presently available at the very time petitioner is seeking to invoke the jurisdiction of the Federal Courts" (Respondent's brief, page 19). This would be so because under the new Uniform Code of Military Justice effective May 31, 1951, another step in the military appellate procedure is provided by Article 67 thereof which is a review by the Court of Military Appeals (yet to be established) consisting of three judges appointed from civilian life by the President * * * for a term of 15 years.

Thus, the petitioner would be on a merry-go-round, in that, his only salvation would be the hope that he could have a complete process through all the courts before the law was further amended. Of course this is not the result intended by, nor the intention of Congress; nor can it be given such construction by this Court.

Respondent urges that to compel the petitioner to avail himself of A. W. 53 would not be a retroactive application of A. W. 53. By what processes this legal conclusion is reached is not set forth. In urging the Sixth Court of Appeals to hold that the petitioner had not exhausted his military appellate reviews, the Judge Advocate General, as counsel for the respondent before that Court, stated in his reply brief that (page 45):

> "In the case at bar it is clear from the context of the statute (Article of War 53, supra) that the purpose of the statute required that it be applied retrospectively and that the facts to which it relates are, of necessity, drawn from an antecedent time."

It is contended by the respondent that the petition for new trial is an indispensable prerequisite in the exhaustion of administrative reviews of a military conviction. Repondent further contends that A. W. 53 is not a mere per-

missive formal type of petition for rehearing. It stands uncontradicted that the "right" to a new trial or the "right" to a hearing upon the application for a new trial is within the sole discretion of the Judge Advocate General. The language further provides that it is not mandatory for the accused to file a petition for new trial but he "may" file such an application; nor does the act provide that it is mandatory upon the Judge Advocate General to so grant such application. The reading is that he "may" grant such application "upon good cause shown" and "in his discretion". As was stated by the Judge Advocate General in respondent's brief (page 10) wherein the following conversation took place at the hearing before the Subcommittee on Armed Services:

> "Mr. Elston. And in the second place, the Judge Advocate General would have the discretion of saying whether or not the petition could be entertained.
>
> "General Hoover. Yes, sir. His decision in that respect would have to be final, and it is so provided in the amendment.
>
> "Mr. Elston. Why shouldn't it be an absolute right rather than discretionary right?
>
> "General Hoover. Because good cause ought to be shown before the Government is put to the expense of a new trial. If it were not discretionary, I think we should have to retry a great many cases where there would be no reasonable cause for a new trial. * * *".

It is stated in the case of *Woods, Housing Expediter* v. *Ginocchio*, 180 Fed. 2nd 484, Feb. 17, 1950, C. C. A. 9th that:

> "It is well established that one need not proceed with optional administrative processes before seeking relief at law from error of the administrator. Levers v. Anderson, 326 U. S. 219, 233, 66 S. Ct. 72, 90 L. Ed.

26; Tucker v. Alexander, 275 U. S. 228, 231, 48 S. Ct. 45, 72 L. Ed. 253; United States v. Abilene and Southern Ry. Co. 265 U. S. 274, 282, 44 S. Ct., 565 68 L. Ed. 1016; Prendergast v. New York Tel. Co., 262 U. S. 43, 49, 43 S. Ct. 466, 67 L. Ed. 853".

It is also stated in the case of *U. S.* v. *Pearce Auto Lines* (1945) 327, U. S. 515, 535:

> "Except in the single instance (Atcheson T & S F & R Co. v. U. S. 284 U. S. 288) it has been held consistently that rehearing before administrative bodies are addressed to their own discretion."

In the case of *Gibson* v. *U. S.* 329, & S. 338, 350 (1946), this Court similarly passed upon the exhaustion of remedies required of one allegedly in violation of the Selective Service Laws. In that case the Government contended that the petitioner had not exhausted his remedies in that he he failed to report to the Army camp. This Court stated "exacting this would strain the requirements of exhausting the administrative process beyond any reason supporting it."

In the case of *Hirota* v. *MacArthur Gen.* 338 U. S. 197, 201 (1948) Justice Douglas stated in his concurring opinion that was rendered in June, 1949 that:

> "Habeas Corpus is a historic right and one of the specific safeguards for personal liberty. See Bowen v. Johnston, 306 U. S. 19, 26. There is no room for niggardly restrictions when questions relating to its availability are raised. The statutes governing its use must be generously construed if the great office of the writ is not to be impaired."

For the reasons stated in this argument and in our previous briefs it is respectfully submitted that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

ARTICLE OF WAR 50½. Review: Rehearing.

The Judge Advocate General shall constitute, in his office, a board of review consisting of not less that three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of re-

view holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part: Provide, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: Provided further, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence

in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments

and officers of the Government: Provided, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War: Provided further, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1950

THOMAS A. GUBIR, PETITIONER

v.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 110

THOMAS A. GUSIK, PETITIONER

v.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 576–581) is reported at 180 F. 2d 662. The Findings of Fact and Conclusions of Law of the trial court appear at R. 17–23.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1950 (R. 575). The petition for a writ of certiorari was filed May 23, 1950, and an order granting the writ was entered June 5, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether resort to a petition for a new trial under Article 53 of the Articles of War is a prerequisite to an attack on a court-martial judgment through habeas corpus.

STATUTES INVOLVED

The relevant statutory provisions including the applicable Articles of War are set forth in the appendix to this brief at pages 24–30.

STATEMENT

On April 27, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Ohio on behalf of Thomas A. Gusik. The petition (R. 1–7) alleged that Gusik was in respondent's custody pursuant to a court-martial judgment convicting him of murdering two persons while stationed in Italy as a member of the armed forces of the United States; that he was denied due process of law; that there was no evidence before the military tribunal connecting Gusik with the fatal bullets; that he was not afforded a competent pre-trial investigation in accordance with AW 70;[1] that he was denied counsel of his own choosing and was represented by incompetent counsel; that the court-martial was guilty of misconduct; that the trial judge advocate suppressed

[1] The Articles of War (10 U. S. C. 1472 et seq.) will be cited as AW —.

evidence favorable to him; and that a statement was obtained from Gusik in a manner inconsistent with the Fifth Amendment. The writ issued (R. 8) and on June 17, 1948, respondent filed a return (R. 9–14), to which petitioner filed a traverse (R. 14–17). After a hearing the court entered an order on March 31, 1949, sustaining the writ and releasing Gusik upon bond (R. 23–24). In its conclusions of law the court found that the court-martial did not have jurisdiction (1) because no thorough and impartial pre-trial investigation was conducted in compliance with AW 70; (2) because the Trial Judge Advocate failed to call all material witnesses; and (3) because Gusik was denied the effective assistance of counsel.

Upon appeal to the Court of Appeals for the Sixth Circuit the order was reversed without consideration of the merits of the contentions advanced by petitioner in the habeas corpus court. The Court of Appeals held that petitioner had failed to exhaust the remedy provided by AW 53 to petition the Judge Advocate General for a new trial and that exhaustion of this remedy is a condition to the exercise of habeas corpus jurisdiction (R. 577–581).

SUMMARY OF ARGUMENT

By enacting Article of War 53 Congress provided a post-conviction corrective procedure designed to permit a calm reexamination of court-

martial convictions obtained during the stress of war. That the remedy is an effective one is evident from the fact that relief has been granted in 11.7 percent of the cases in which petitions have been filed pursuant to AW 53. There is no conceivable reason why the firmly-rooted principle that all other remedies must be exhausted before a habeas corpus court will act should not be adhered to in cases involving court-martial judgments. The same considerations of policy which are persuasive with respect to the relations between state and federal courts are equally applicable with respect to the relations between civil courts and military tribunals.

Petitioner's argument that the finality provision of AW 53 forecloses all habeas corpus review rests on a misconstruction of the statute. The language making the military determination final simply makes explicit what has been the settled course of judicial decision, namely that the civil courts should not review court-martial trials on their merits. The legislative materials conclusively show that the finality language was not intended to foreclose habeas corpus review of jurisdictional questions.

The regulations issued by the President pursuant to AW 53 and the administrative practice conform to the congressional purpose.

ARGUMENT

SINCE ARTICLE OF WAR 53 PROVIDES AN EFFECTIVE METHOD FOR CORRECTING ERRORS IN COURT-MARTIAL PROCEEDINGS, RESORT TO THAT ARTICLE MUST BE HAD BEFORE A CIVIL COURT MAY CONSIDER A PETITION FOR HABEAS CORPUS

This Court has held consistently that, where a person seeks in a Federal court to attack collaterally his conviction in a State court, ordinarily the attack must fail if he has not exhausted the available remedies in the State courts. *Ex parte Hawk,* 321 U. S. 114, *Mooney* v. *Holohan,* 294 U. S. 103; *Ex Parte Abernathy,* 320 U. S. 219; *Darr* v. *Burford,* 339 U. S. 200. Similarly, this Court has refused judicial review of administrative determinations where there has been a failure to exhaust administrative remedies. See e. g., *United States* v. *Sing Tuck,* 194 U. S. 161; *Falbo* v. *United States,* 320 U. S. 549. The policy considerations which underlie these decisions are so firmly rooted in our law that Congress has now specifically written them into the Judicial Code with respect to collateral habeas corpus review of State and Federal judgments of conviction. Section 2254 of 28 U. S. C. which is set forth in the Appendix at p. 28, relating to State court convictions, expressly provides that a writ of habeas corpus shall not be granted unless it appears that the applicant has exhausted the remedies available in the State courts, and the statute makes it plain that the remedies have not been exhausted "if

he has the right under the law of the State to raise, by any available procedure, the question presented." Likewise, 28 U. S. C. Section 2255, Appendix, pp. 29–30, relating to Federal court convictions, requires that the writ shall not issue unless the prisoner has availed himself of the statutory remedy by motion in the convicting court to vacate, correct or set aside the sentence.

The sole issue which this case presents is whether the policy which has commended itself both to this Court and Congress shall be applied with respect to courts-martial. In addition to the decision below and the decision in the *Whelchel* case (No. 109, O. T. 1950), every other decision on the question has held that resort to AW 53 is a prerequisite to habeas corpus. *Hunter* v. *Beets,* 180 F. 2d 101 (C. A. 10), certiorari denied, 339 U. S. 963; *McMahan* v. *Hunter,* 179 F. 2d 661 (C. A. 10), certiorari denied, 339 U. S. 968; *Simmons* v. *Hunter,* 179 F. 2d 664 (C. A. 10), certiorari denied, 339 U. S. 968; *Evans* v. *Hunter,* 180 F. 2d 354 (C. A. 10); *Dickens* v. *Hunter,* 179 F. 2d 784 (C. A. 10); *Reck* v. *Hunter,* 179 F. 2d 784 (C. A. 10); *Hiatt* v. *Burchfield,* 179 F. 2d 679 (C. A. 5), certiorari denied, 339 U. S. 987; *Hiatt* v. *Jackson,* 179 F. 2d 680 (C. A. 5), certiorari denied, 339 U. S. 968; *Hiatt* v. *Fugate,* 179 F. 2d 679 (C. A. 5); *Spencer* v. *Hunter,* 177 F. 2d 370 (C. A. 10). This Court refused to review five of the decisions so holding.

As we show below, Congress has provided in the

system of military law a corrective process for righting injustices. That process which provides relief in the broadest possible terms—"upon good cause shown"—permits a review far broader than that available in habeas corpus. In view of the strong policy which has always caused the civil courts to narrow their functions in reviewing or correcting proceedings in the military courts, every pertinent consideration leads to the conclusion that petitioner should be required to exhaust the remedies available to him before he asks the civil courts collaterally to review the military judgment.

1. *AW 53 Provides an Effective Post-conviction Remedy.*—As a result of the experience gained in the administration of military justice during World War II, Congress enacted various modifications of the Articles of War for the purpose of better insuring ultimate justice. (62 Stat. 604, 627–644, 10 U. S. C., Supp. II, 1472–1593). Included in the new legislation which became effective February 1, 1949, is AW 53 (10 U. S. C., Supp. II, 1525), which added a procedure for correcting errors in convictions and sentences which have been finally approved and ordered executed. AW 53 permits a prisoner within one year of his conviction, or within one year after the end of World War II, whichever is later, to apply to the Judge Advocate General upon a showing of good cause for a new trial or to vacate sentence and to restore rights, privileges, and

property affected by such sentence. It is to be noted that the petition for new trial authorized by AW 53 is separate and distinct from the power of the reviewing authority under AW 52 to direct a rehearing on the basis of matters of record. AW 53 is designed to permit a reconsideration of a final conviction on the basis of facts of record and of facts dehors the record.

Consistently with the provisions of AW 53, the President has prescribed regulations which appear in chapter XXII of the Manual for Courts-Martial, United States Army, 1949 (effective February 1, 1949), pp. 108–110. Under these regulations, a person whose conviction has been finally confirmed may file a petition for relief, either in person or by counsel and regardless of whether he is in the service or has been separated from the service. The petition must be in writing and signed under oath or affirmation by the accused or his representative and must set forth, in full, the basis upon which it is claimed there has been an injustice. Where facts outside the record are relied upon, the petitioner is required to submit the affidavit of each person whom he expects to present as a witness in the event of a new trial. Upon request, the Judge Advocate General may allow oral argument on the petition and, where necessary, he may undertake an additional investigation into the facts to secure such additional evidence as he may deem appropriate. If the

Judge Advocate General is persuaded petition presents "good cause" he may grant a new trial or such other appropriate relief. We are advised by the offices of the Judge Advocates General of the Army and Air Force that during the period from February 1, 1949, to July 10, 1950, 389 applications under AW 53 were received by them, and that 284 were acted upon during that period. Relief was granted in 33 cases.[2] Of the cases in which relief

[2] In sponsoring the new AW 53, Brigadier General Hoover of the Judge Advocate General's Department testified as follows (Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, on H. R. 2575, 80th Cong., 1st sess., pp. 2121–2122):

"General HOOVER. The amended article of war 53 is entirely new. I may say that the conception, the idea of it is taken largely from Mr. Durham's bill. It provides for a new trial as distinguished from a rehearing, after the sentence has been ordered into execution. It provides for the grant of a new trial upon application to the Judge Advocate General and gives the Judge Advocate General the power to grant a trial de novo, a new trial in every sense, or to vacate sentences and restore rights and privileges lost as a result of executed sentences. It is limited in time to 1 year after final disposition of the case on appellate review and in the case of World War cases to 1 year after the termination of the war or final disposition, whichever is the latter. It is also provided that there shall be but one application for new trial in any one case. The principle of this article is adopted with the thought that it will provide a means of correcting possible injustices, particularly with respect to cases tried in time of war where the accused person may not have had an opportunity to present fully his defense in ordinary course.

"Mr. ELSTON. As I see it, General, there are two limitations on this right. The first is the petition for a review

under AW 53 was denied, at least three accused persons have petitioned a federal court for writs of habeas corpus. In none of those cases has it

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which would have to be in accordance with regulations issued by the President.

"General HOOVER. Yes, sir.

"Mr. ELSTON. And in the second place, the Judge Advocate General would have the discretion of saying whether or not the petition could be entertained.

"General HOOVER. Yes, sir. His decision in that respect would have to be final, and it is so provided in the amendment.

"Mr. ELSTON. Why shouldn't it be an absolute right, rather than discretionary right?

"General HOOVER. Because good cause ought to be shown before the Government is put to the expense of a new trial. If it were not discretionary, I think we should have to retry a great many cases where there would be no reasonable cause for a new trial at all. Take the ordinary desertion case, where the man admitted his absence, admitted his intent to remain away from the Army during the war. He was given a sentence within normal limits. His application for new trial is not accompanied by any showing that he was prevented in any way from presenting his defense or by any showing that he has new evidence, or by any showing that error was committed. There would not seem to be any reason in such a case to grant a new trial.

"Mr. ELSTON. What would the procedure be if a petition for a new trial were filed? Would the accused be granted a hearing on his petition?

General HOOVER. Yes, sir.

"Mr. ELSTON. To determine whether or not good cause was shown.

"General HOOVER. A hearing under the regulations to be prescribed is contemplated; yes, sir.

"Mr. ELSTON. It would be contemplated that in that hearing the accused could appear and offer any evidence and

been claimed or held that the habeas corpus court lacked its traditional jurisdiction.[3]

Thus there exists in the judicial system of the military an effective and still available remedy for petitioner to which he has not resorted. The remedy was created for the benefit of persons in petitioner's class and there is no conceivable reason why he should not be required to exhaust it before a civil court is asked collaterally to review the judgment of a military tribunal in a habeas corpus proceeding. Instead, that avenue of relief affords petitioner a review of much more

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could have counsel representing him for the purpose of convincing the Judge Advocate General that a new trial should be granted.

"General HOOVER. Yes, sir.

"Mr. ELSTON. In other words, it would not be passed upon simply on the petition itself?

"General HOOVER. Nor on the record of trial itself. The accused person would be offered every reasonable opportunity to present anything that he wished in support of his motion for a new trial.

"Mr. ELSTON. I am glad you clarified that because it is not entirely clear from the section itself, and that question certainly would be raised.

"General HOOVER. I think it must be clear. I think the authority for granting new trials would not be effective unless the opportunity for a hearing be provided. In drafting the amendment, it was contemplated that such matters would be covered in the regulations to be prescribed by the President."

[3] *Chaney* v. *Arnold*, No. 1386 H. C., D. C. Kan., March 27, 1950, writ denied, petition dismissed on other grounds June 19, 1950; (AW 53 application for relief had been denied March 21, 1950); *Evans* v. *Hunter*, No. 1472 H. C., D. C.

than the bare jurisdictional questions which are open in habeas corpus. Indeed, AW 53 is particularly appropriate for examination of the kind of errors which he set forth in his petition in this case.

2. *Petitioner's Excuses for not Resorting to AW 53 are Without Merit.*

(a) Petitioner argues that AW 53 is unconstitutional because it provides that the action of the Judge Advocate General "shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States." In petitioner's view, this language deprives the civil courts of jurisdiction to review in any respect the action of the Judge Advocate General and thus amounts to an unconstitutional suspension of the writ of habeas corpus. (Petitioner's Brief in Support of Petition for Certiorari, p. 17.) Since, as we shall show, the finality provision was never intended to interfere with the jurisdiction of a habeas corpus court, it follows that AW 53 is not unconstitutional for the reasons asserted by petitioner.

Kan., June 12, 1950 (pending); (AW 53 application for relief had been denied April 14, 1950); *McKinney* v. *Hunter*, No. 1439 H. C., D. C. Kan., March 15, 1950, writ denied, petition dismissed on other grounds June 19, 1950; (AW 53 application had been denied August 23, 1949).

Parenthetically, it may be noted that a finality provision in identical language appears in AW 50 (h) (10 U. S. C., Supp. II, 1521 (h)) which relates to action in reviewing or confirming a conviction upon ordinary appellate review. Thus with respect to convictions after February 1, 1949, the same statutory finality applies regardless of whether an AW 53 petition is filed.

It is perfectly clear, both from the legislative materials and from the construction adopted by the President in regulations issued pursuant to the legislation, that the finality provisions do not, and were not intended to, deprive the habeas corpus courts of their traditional powers to review collaterally judgments of military tribunals for jurisdictional errors. At the last term of this Court, the Court stated in *Hiatt* v. *Brown*, 339 U. S. 103, 111, that:

> It is well settled that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * *. The single inquiry, the test, is jurisdiction."

While this finality of court martial proceedings—which did not preclude judicial scrutiny of jurisdictional issues—has been established by judicial decision, the Articles of War, prior to the 1948 amendments, did not so provide in express terms. By adding the finality provisions of AW 50 (h) and AW 53, Congress simply made explicit

what had been the practice throughout the years. Thus, Brigadier General Hoover, testifying in support of the legislation, explained with reference to AW 50 (h) that "the principle [of finality] is well established at present but the amendment is somewhat more definite than the present article." Hearings, note 2, *supra*, p. 2118. The House Report (No. 1034, 80th Cong., 1st sess., pp. 7, 12) similarly states that the amendment "makes explicit the finality of sentences of court martial." The regulations adopted by the President pursuant to the legislation expressly recognize that:

> The proceedings, findings, and sentences of courts-martial as approved, reviewed or confirmed pursuant to the Articles of War are final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, and agencies and officers of the United States, subject only to action upon application for a new trial as provided in Article 53 (AW 50*h*). Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers. See chapter XXX. [Manual for Courts-Martial, United States Army, 1949, p. 8.]

Whatever possible doubt there might be as to the meaning of the finality provisions is dispelled by subsequent legislative developments. In May 1950, Congress enacted a Uniform Code of Military Justice to become effective on May 31, 1951. Pub. Law 506, 81st Cong., 2d sess.[4] Article 76 contains a finality provision in the same terms as are used in AW 50 (h) and AW 53. Both H. Rep. 491, p. 35, and S. Rep. 486, 81st Cong., 1st sess., p. 32, state that the finality provision of Article 76 "is derived from AW 50 (h) and is modified to conform to the terminology used in this code." That the finality language was never intended to foreclose "the traditional collateral

[4] While the Uniform Code does not become effective until 1951 and the present Articles of War are not repealed until then (see Section 5 and Section 14 (a), it should be noted that Section 12 of the act reenacts the petition for new trial provisions of AW 53, and that section is made effective May 5, 1950. See Section 5. Thus, until May 31, 1951, both AW 53 and Section 12 of Public Law 506 are in effect. In view of the express provision in Section 14, repealing the Articles of War, including AW 53, on May 31, 1951, and, in view of the express language in Section 12 referring to AW 53, it cannot be argued that Section 12 supersedes AW 53 at this time. For some reason not apparent from the legislative materials, Section 12 fails to include the finality provision contained in AW 53. While the omission of the finality provision in Section 12 appears to have been an oversight, the discrepancy is immaterial, in view of the construction of the finality provision of AW 53 for which we contend. Since the finality provision makes explicit what already is decided by the cases, its presence or absence does not affect the disposition of this case.

review in habeas corpus is expressly stated in the Reports as follows:

> Subject only to a petition for a writ of habeas corpus in a Federal cout, it [Article 76] provides for finality of court-martial proceedings and judgments.

The same understanding was expressed in the Senate debate, as follows (96 Cong. Rec. (daily ed.) 1442):

> Mr. SALTONSTALL. * * * "Subject only to a petition for a writ of habeas corpus in Federal court, it [Article 76, UCMJ] provides for the finality of court-martial proceedings and judgments."
>
> So the question was directly considered by the committee * * *.
>
> Mr. MCCARRAN. That is in the report, but why is it not in the bill?
>
> * * * * *
>
> Mr. KEFAUVER. I call the Senator's attention to the fact that the language about the finality of the finding of the court-martial is identically the same as the language which has been in the law previously. It was in the Kem amendment to the bill passed by Congress in 1948; so that there is nothing new about the language in the proposed Uniform Code.
>
> * * * * *
>
> The point I am trying to make is that the pending bill adds nothing new in the matter of the finality of court-martial proceedings. * * *

> MR. MCCARRAN. What does the bill mean when it says "binding on all departments, courts, agencies, and officers of the United States"? Does not that attempt to bind the courts?
>
> Mr. KEFAUVER. As I said, it is the same language at that which was in the Kem amendment in 1948. It attempts to bind the courts on all matters except jurisdictional matters.

Bearing in mind the fact that the same committees of Congress considered the 1948 and 1950 legislation, that the finality provision of the 1950 legislation is derived from the 1948 enactment, and that the interval of time between the two enactments is less than two years, there can be no doubt that Congress did not intend to foreclose habeas corpus review in appropriate cases. See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, 329–330.

To the extent that petitioner's argument rests on the contention that the writ is unlawfully suspended if the prisoner is required to exhaust first his other remedies, it collides with settled judicial and legislative practice. From the enactment of the first Judiciary Act of 1789 (1 Stat. 73, 81) Congress has authorized issuance of the writ in situations "warranted by the principles and usages of law." In cases involving state prisoners, exhaustion of state remedies has always been recognized as a prerequisite to habeas corpus without any thought that the result was

to suspend the operation of the writ. See p. 5, *supra*. And, as we have shown, the 1948 revision of the Judicial Code incorporates the exhaustion of remedies concept into the habeas corpus provisions. The courts have not been persuaded that the application of a wise principle of judicial administration in any manner amounts to a suspension of the writ. *Martin* v. *Hiatt*, 174 F. 2d 350, 352 (C. A. 5); *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10); *St. Clair* v. *Hiatt*, 83 F. Supp. 585 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967; *Wong* v. *Vogel*, 80 F. Supp. 723 (E. D. Ky.). Cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 170; *Glasgow* v. *Mayer*, 225 U. S. 420; *Johnson* v. *Hoy*, 227 U. S. 245; *Riggins* v. *United States*, 199 U. S. 547; *Minnesota* v. *Brundage*, 180 U. S. 499; *Baker* v. *Grice*, 169 U. S. 284.

b. Petitioner also argues that a voluntary submission to the procedures of AW 53 will amount to a waiver of his constitutional right to resort to habeas corpus. But this argument rests entirely on his view that the finality provision of AW 53 forecloses habeas corpus review. Since there is no basis for that construction of AW 53, it follows that petitioner will not estop himself from resort to habeas corpus if he is unsuccessful in an application for a new trial under AW 53. Indeed, as we have shown, *supra*, applications for habeas corpus have been considered by the federal courts after the denial of an AW 53 petition.

c. Petitioner also argues that to require him to exhaust the remedy provided by AW 53 gives that Article of War a retroactive effect. In support of this argument he points to the fact that he filed his petition for habeas corpus prior to February 1, 1949, when AW 53 became effective. The short answer is that no effort is being made to apply AW 53 retroactively. AW 53 is a remedy presently available at the very time petitioner is seeking to invoke the jurisdiction of the civil courts. He must exhaust that present remedy before he is entitled to pursue his petition for a writ of habeas corpus. The situation would be no different in the case of a prisoner previously convicted in the state or federal courts. Before he would be entitled to a writ of habeas corpus he would be required to demonstrate that he had complied with Sections 2254 or 2255 of 28 U. S. C., as the case may be, notwithstanding that those provisions were enacted subsequent to his conviction. In this respect, the case is similar to the many habeas corpus cases from Illinois after the Illinois Post-Conviction Hearing Act was adopted in which resort to a subsequently created state remedy was required. See e. g., *Walker* v. *Ragen* (and six other similar cases), 338 U. S. 833; *Marks and James* v. *Ragen*, 339 U. S. 926; see also *United States ex rel. Peters* v. *Ragen*, 178 F. 2d 377 (C. A. 7); *United States ex rel. Hamby* v. *Ragen*, 178 F. 2d 379 (C. A. 7);

United States ex rel. DeFrates v. *Ragen*, 181 F. 2d 1001 (C. A. 7). There likewise is no merit to petitioner's argument that the doctrine of exhaustion of administrative remedies may not be applied to him because it was asserted for the first time in the Court of Appeals. We believe that the court below properly disposed of the argument with the answer that the principle involves a matter of judicial administration which the Court could apply even if respondent had not urged it. The Illinois cases cited in the last paragraph are equally applicable on this point.

d. There is no merit to the related argument that, as a matter of construction, AW 53 does not and was not intended to apply to World War II court-martial cases in which, as in this case, the appellate review had been completed prior to the effective date of the Article, or that it does not apply where habeas corpus proceedings had been initiated prior to the effective date of the statute. The statute is explicitly applicable to World War II cases, and its avowed purpose was to provide a corrective procedure for possible injustices which arose in the hurly-burly of war. While Executive Order 10020,[8] which promulgated the

[8] The Executive Order is in the following terms:

"PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1949

"By virtue of the authority vested in me by Chapter II of the act of Congress entitled 'An act to amend an act entitled "An Act for making further and more effectual

Manual for Courts-Martial, United States Army, 1949, provides that investigations, trials or other action begun before February 1, 1949, may be completed in accordance with the provisions of the 1928 Manual for Courts-Martial, the Order states that the 1949 manual shall be in force and effect on and after February 1, 1949, "with respect to all court-martial processes taken on or after February 1, 1949." A petition for new trial is such a process. Chapter 22 of the 1949 Manual (pp. 108–110), specifically relating to the AW 53 remedy, contains no limitation restricting the remedy to convictions after February 1, 1949. Any doubt in this respect is resolved by Section 12 of Public Law 506, *supra,* which reenacts the remedy afforded by AW 53, and which, in express terms, applies to "any court-martial case involving offenses committed during World War II."

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provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice,' approved June 4, 1920 (41 Stat. 787), as amended by Title II of the act entitled 'An act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes,' approved June 24, 1948 (62 Stat. 627), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designed as 'Manual for Courts-Martial, U. S. Army, 1949.'

"This manual shall be in force and effect in the Army of the United States on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949: *Provided*, that nothing contained in this manual shall be construed to invalidate any investigation,

e. Petitioner seeks to liken the AW 53 remedy to a petition for rehearing such as was involved in *Levers* v. *Anderson*, 326 U. S. 219. However, the foregoing discussion of the place of AW 53 in the scheme of military justice makes it plain that the remedy is not comparable to the limited procedure for correcting decisions on the basis of a preexisting record such as is involved in the usual petition for rehearing. Instead of being a mere formality, such as petitioner argues, the AW 53 remedy affords petitioner a full opportunity to present any facts, either in the record or outside the record, which support his view that he has not been fairly convicted. This post-conviction procedure was created for the very purpose of permitting complete reconsideration, thus allowing the military authorities to correct any injustices which may have arisen. Particu-

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trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: *Provided further*, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: *And provided further*, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense.

[Signed] HARRY S. TRUMAN.

THE WHITE HOUSE,
December 7, 1948."

larly in the light of the experience gained in the application of AW 53, in which 11.7 percent of the petitions for relief have been granted, to require petitioner to file a petition under AW 53 is not to require him to do a useless act.

CONCLUSION

Petitioner has not exhausted a presently available remedy. If he files a petition for new trial under AW 53 and is unsuccessful, he will then be entitled to attack in habeas corpus the jurisdiction of the military tribunal. We respectfully submit that the judgment of the court below should be affirmed.

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OCTOBER 1950.

APPENDIX

Title II of the Act of June 24, 1948 (62 Stat. 604; 10 U. S. C., Supp. II, 1472–1593) amending the Articles of War, provides in pertinent part:

ART. 50. (10 U. S. C., Supp. II, 1521 (h)) Appellate Review.—* * *

* * * * *

h. *Finality of court-martial judgments.*—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

* * * * *

ART. 52. (10 U. S. C., Supp. II, 1524) *Rehearings.*—When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advo-

cate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

ART. 53. (10 U. S. C., Supp. II, 1525) *Petition for new trial.*—Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge, previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and

all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

The Act of May 5, 1950 (Pub. Law 506, 81st Cong., 2d sess.), establishing, *inter alia,* a Uniform Code of Military Justice, provides in pertinent part:

SEC. 1. * * *

* * * * * *

ART. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by

the Secretary of a Department as provided in article 74, and the authority of the President.

* * * * *

SEC. 5. This Act shall become effective on the last day of the twelfth month after approval of this Act, or on July 1, 1950, whichever date is later: *Provided,* That the provisions of article 67 (a) of this Act shall become effective on the last day of the ninth month after approval of this Act: *Provided further,* That the provisions of section 12 of this Act shall become effective on the date of the approval of this Act.

* * * * *

SEC. 12. Under such regulations as the President may prescribe, The Judge Advocate General of any of the armed forces is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance, in any court-martial case involving offenses committed during World War II in which application is made within one year after termination of the war, or after its final disposition upon initial appellate review whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* Within the meaning of this section and of article of war 53, World War II shall be deemed to have ended as of the effective date of this Act.

* * * * *

SEC. 14. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any substantive rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787–811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

* * * * *

The Judicial Code provides in part:

§ 2254. State custody; remedies in State courts.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court of the United States claiming the

right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

U. S. GOVERNMENT PRINTING OFFICE: 1950